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ABSTRACT

This paper describes and analyzes the internal consistency of the formal and informal legal frameworks governing certain aspects of the Education Consolidation and Improvement Act of 1981 Chapter 1 Program. A major focus is how these frameworks differ from those of Title I of the Elementary and Secondary Education Act of 1965, the program which Chapter 1 superseded. The formal framework of Chapter 1 includes statutory provisions, federal regulations, Education Department guidelines, and congressional interpretations that are published and disseminated widely throughout the 14,000 participating school districts. Informal frameworks are Education Department correspondence and written instruments and instructions that the programs generate. The frameworks are discussed in the following three categories: (1) federal management and oversight; (2) state management and oversight; and (3) local implementation. In general the legal provisions were found to be consistent on all levels after technical amendments and other adjustments are considered. There has been some success in the efforts to reduce the length, prescriptiveness, and complexity of the legal framework. Some inconsistency was found in ensuring service equivalence, but the solution for this lies with administrators and the fairness with which personnel is assigned. (VM)

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INTRODUCTION

Scope of This Analysis

Chapter 1 of the Education Consolidation and Improvement Act of 1981 (ECIA) provides financial assistance to local school districts for special programs for educationally deprived children from low-income areas.[1] Chapter 1, which supersedes Title I of the Elementary and Secondary Education Act of 1965, is the largest federal program providing aid to elementary and secondary education. Over four million children in approximately 14,000 school districts participate in Chapter 1 programs. In Fiscal Year (FY) 1986, Congress appropriated approximately three billion dollars for the Chapter 1 program.

In the 1983 Technical Amendments to Chapter 1 of ECIA, Congress mandated a National Assessment of Compensatory Education. To carry out the assessment, the Department of Education (ED) commissioned several projects, including a study of federal administration of Chapter 1, of which this paper is a part.[2]

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[1] Chapter 1 also authorizes funds for programs operated by State agencies for migratory children, handicapped children in State schools or children who have left these schools and returned to schools in regular school districts, children who reside in institutions for neglected or delinquent children, and funds for States to administer Chapter 1 programs. In addition, Chapter 1 provides funds for programs operated for Indian children by the Department of Interior's Bureau of Indian Affairs. This paper concerns only the Chapter 1 basic grant program for services provided by local school districts.

The purpose of this paper is to describe, contrast with Title I, and analyze the internal consistency of the formal and informal legal frameworks governing certain aspects of Chapter 1 selected by ED staff. We were not asked to analyze the clarity or comprehensiveness of the legal framework.

In this paper, the formal legal framework includes statutory provisions, congressional interpretations in House, Senate and Conference Committee Reports, federal regulations, comments accompanying regulations, and ED guidelines, whether issued in question and answer format or denominated nonregulatory guidance. These documents constitute the published and widely-disseminated documents announcing, interpreting, or discussing the law of Chapter 1. We also examine as part of the formal legal framework one case, Aguilar v. Felton, 473 U.S. ___, 105 S.Ct. 241, 53 U.S.L.W. 5013 (1985), because of its significant impact on provision of Chapter 1 services to students in private schools.

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[2] The study of federal administration consists of this study and three other studies: Moore, M.T. and K. Pontzer, "Federal Administration of Chapter 1, ECIA: Substudy of Compliance Activities". Washington, D.C.: Decision Resources Corporation (1987); Funkhouser, J.E., M.T. Moore and J.S. Mitchie, "Federal Administration of Chapter 1, ECIA: Staffing and Financial Support Substudy". Washington, D.C.: Decision Resources Corporation (1987); and Reisner, E.R. and E. Marks. "Federal Administration of Evaluation, Program Improvement, and Technical Assistance Under ECIA, Chapter 1". Washington, D.C.: Policy Studies Associates (1987).

For our purposes, the informal legal framework is limited to ED correspondence responding to requests for interpretations from individuals and organizations, and written instruments and instructions for federal program monitors and federal auditors. We were not asked to examine other documents, such as state regulations and guidelines, or federal and state program review letters or audit reports.[3]

In discussing the designated aspects of the Chapter 1 legal framework, we have focused on the issues having implications for federal education policy. We have compressed discussion of, or omitted entirely, matters which, though falling within the designated topics, have less significance for policy. For example, we do not examine the procedural questions that might arise during a hearing challenging bypass of a local educational agency (LEA) in the provision of Chapter 1 services to private school students. Legal liability for the physical safety of private school Chapter 1 participants is not addressed. Discussion of the Single Audit Act's detailed regulations is compressed. Restrictions on, and OMB clearance procedures governing, federal contractors' data-gathering are omitted. Other topics tangential to policy concerns are treated briefly or not at all.

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[3] Federal program review letters and audit reports are addressed in another part of the federal administration study prepared for the National Assessment. See Moore and Pontzer, cited in note 2.

The Evolution of the Legal Framework

The Education Consolidation and Improvement Act (ECIA), including Chapter 1, became law on August 13, 1981 as part of the Omnibus Budget Reconciliation Act of 1981, a sweeping law addressing many subjects. Chapter 1 did not become effective until the following school year.

Part of Chapter 1's intent, as stated in the law's declaration of policy, is to "free the schools of unnecessary Federal supervision, direction, and control" and to free educators "from overly prescriptive regulations and administrative burdens which are not necessary for fiscal accountability and make no contribution to the instructional program." §552 of Chapter 1 (20 U.S.C. §3801).

In October 1981, ED issued draft "Questions and Answers Concerning the Education Consolidation and Improvement Act of 1981." A notice of proposed rulemaking for Chapter 1 followed on February 12, 1982. In April 1982, ED issued draft nonregulatory guidance (NRG) for Chapter 1. ED published final regulations for Chapter 1 on July 29, 1982, but on August 10, 1982, the House of Representatives unanimously disapproved these regulations. Key House members disputed provisions asserting inapplicability to

Chapter 1 of the General Education Provisions Act (GEPA).[4] The Senate also disapproved these Chapter 1 regulations.[5] As a result, the 1982-1983 school year, the first under Chapter 1, began with an evolving legal framework.

ED, however, reconsidered its position on the GEPA issue and published new final regulations for Chapter 1 on November 19,

---

[4] GEPA contains many legal provisions concerning the administration of federal education programs. As originally enacted, Chapter 1 was ambiguous about the extent to which GEPA applied to Chapter 1. The preface to the July 29, 1982 Chapter 1 regulations, which Congress vetoed, asserts that, except for a few specific provisions, GEPA did not apply to Chapter 1. ED said "[t]his determination was made because Section 596 of the ECIA is ambiguous on the issue of GEPA applicability and because of the concern that Chapter 1 be kept as free as possible from the detailed and sometimes conflicting requirements in GEPA that would decrease the flexibility and increase the burden of SEAs and LEAs in carrying out their Chapter 1 responsibilities." 47 FR 52342 (November 19, 1982).

The preface to the July 29, 1982 regulations also asserts that the Education Division General Administrative Regulations (EDGAR), which are authorized by GEPA, did not apply to Chapter 1 except for a part related to non-federal audits.

[5] The statutory procedure invoked by the House and Senate to disapprove the regulations, however, is of doubtful constitutionality under a 1983 Supreme Court decision, INS v. Chadha, 462 U.S. 919 (1983).

1982.[6] In December, Congress, attempting principally to restore several Title I provisions Chapter 1 had omitted in 1981, enacted ECIA technical amendments. These amendments also announced, with exceptions, the applicability of GEPA to Chapter 1. The 1982 technical amendments, however, were not signed by the President. One of the reasons they did not become law was the continuing dispute over GEPA's applicability to Chapter 1.

While a second set of technical amendments wended through Congress, ED issued it first Chapter 1 nonregulatory guidance

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[6] The preface to the November 19, 1982 Chapter 1 regulations stated that GEPA applies to Chapter 1 except for several provisions. According to the preface, the superseded or inapplicable GEPA provisions were as follows: §408(a)(1) (authority for federal regulations), §425 (federal review of certain State actions), §426 (federal technical assistance), §427 (authority for federal regulations concerning parental involvement), §430 (applications for federal financial assistance), §431A (maintenance of effort), §434(a)(1) (State monitoring plan), §434(a)(3) (State complaint resolution), §434(b) (authority for States to suspend or withhold payments), §435(a) (State application), §435(b)(1), (b)(3), (b)(4), and (b)(6)-(b)(8) (State application assurances concerning compliance, monitoring, evaluation, and other topics), §436(a)(local educational agency (LEA) application), §436(b)(1), (b)(4)-(b)(9) (LEA application assurances concerning compliance, reporting, public involvement and other topics), §437(b) (access to records), §453 (federal withholding), and §455 (judicial review). 47 FR 52342-5 2343 (November 19, 1982)

The preface to the regulations explains why these GEPA provisions were considered to be inapplicable to Chapter 1 and repeats that the EDGAR regulations do not apply to Chapter 1 except for a part concerning non-Federal audits.

(NRG) in June 1983.[7] Six months later, in December 1983, Congress enacted Technical Amendments, which became law and settled the major GEPA questions. Under these Technical Amendments, several GEPA provisions are deemed superseded by provisions of ECIA; others, except for small portions, are rendered inapplicable to Chapter 1.[8]

Two additional sets of final regulations then were promulgated -- one set in April 1985 (concerning due process procedures), and a second set in May 1986 (implementing the

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[7] The June 1983 NRG indicates that it is binding on ED, but not on State educational agencies (SEAs) and local educational agencies (LEAs). The NRG does not impose any requirements beyond those in the Chapter 1 statute and regulations. The purpose of the NRG is to provide acceptable -- but not exclusive -- guidance as to Chapter 1 requirements. Appended to the NRG are a copy of the Chapter 1 statute, excerpts from the Title I and GEPA statutes, the Chapter 1 regulations, and the Attachment P audit requirements from OMB Circular A-102.

[8] As amended, §596 of ECIA (20 U.S.C. §3876) states:

> (a) Except as otherwise specifically provided by this section, [GEPA] shall apply to the programs authorized by this subtitle.
>
> (b) The following provisions of [GEPA] shall be superseded by the specified provisions . . . :
>
> (1) Section 408(a)(1) [authority for Federal regulations] of [GEPA] is superseded by section 591(a) . . . .
>
> (2) Section 426(a) [Federal technical assistance] of [GEPA] is superseded by section 591(b) . . . .
>
> (3) Section 427 [authority for Federal regulations concerning parental involvement] of [GEPA] is superseded by section 556(b)(3) . . . .
>
> (4) Section 430 [applications] of [GEPA] is superseded by sections 556(a) and 564(b) . . . .
>
> (5) Section 431A [maintenance of effort] of

[continued on next page]

Technical Amendments).[9] And, in December 1986, ED issued a second revised NRG which reflected the 1983 Technical Amendments.[10]

ECIA reflects an intent to deregulate the largest federal education program for elementary and secondary education. Title I, as amended by the Education Amendments of 1978, had reflected a Congressional decision that a clear, comprehensive, specific, and internally consistent legal framework (albeit lengthy, complex, and prescriptive) should guide the flow of billions of

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[8] [continued from previous page]

> [GEPA] is superseded by section 558(a) . . . .
>
> (6) Section 453 [Federal withholding] of [GEPA] is superseded by section 592 . . . .
>
> (7) Section 455 [judicial review] of [GEPA] is superseded by section 593 . . . with respect to judicial review of withholding of payments.
>
> (c) Sections 434, 435, and 436 of [GEPA] except to the extent that such sections relate to fiscal control and fund accounting procedures, shall not apply to the programs authorized by this subtitle and shall not be construed to authorize the Secretary to require any reports or take any actions not specifically authorized by this subtitle.

[9] In the meantime, Congress enacted the Single Audit Act in October 1984; regulations under this act were promulgated in September 1985.

[10] Our analysis, however, frequently emphasizes the 1983 NRG because these guidelines were in effect during the data collection and field work phase of the National Assessment. We have referred to the 1986 NRG at various points, often in footnotes, to ensure that our analysis is complete and to show that certain questions raised by the 1983 NRG have been addressed in the 1986 NRG.

federal dollars for compensatory education.[11] Less than three years later, Congress elected to use a truncated and less specific legal framework to direct the delivery of the same aid through Chapter 1. The Secretary also followed this approach. When combined, these deregulation efforts:

- superseded certain GEPA provisions and rendered others inapplicable to Chapter 1;[12]
- rendered most of EDGAR inapplicable to Chapter 1;
- constrained the authority of the Secretary to issue regulations;
- produced many regulations merely paraphrasing the statute;
- led to nonregulatory guidance that is only binding on ED;
- specified that Chapter 1 regulations did not have the force and effect of law for purposes of judicial review; and
- included a statutory presumption (for purposes of judicial review) that recipients of Chapter 1 funds have complied with the law.

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[11] Congressional concern for the clarity and consistency of the legal framework permeates the House and Senate reports discussing the 1978 amendments, and one of the principal results of those amendments was placement in the statute of several specific concepts previously developed, but not widely disseminated, by the Office of Education.

[12] The Chapter 1 provisions superseding or making certain GEPA provisions inapplicable to Chapter 1 do not by themselves affect the applicability of all parts of the EDGAR regulations. ED, however, has made most of the EDGAR regulations inapplicable to Chapter 1.

This is the context in which the paper provides an overview of selected aspects of the legal framework for Chapter 1.

Organization of the Paper

The legal provisions we discuss fall in three categories: federal management and oversight; State management and oversight; and local implementation.

Federal management and oversight includes rulemaking, receipt of State assurances, monitoring, auditing, enforcement mechanisms, and evaluation, record keeping, and reporting.

State management and oversight encompasses rulemaking, application approval, monitoring, auditing, enforcement mechanisms and evaluation, record keeping and reporting.

The legal framework governing local implementation, for our purposes, is limited to the supplement, not supplant and comparability provisions, as well as provisions concerning parent involvement, services to children in private schools, local evaluation, reporting, and record keeping, and carryover of funds. Although the provisions governing school attendance area and student eligibility and selection are important parts of the legal framework, these provisions are not included in our analysis because another study commissioned by the National Assessment discusses them.[13]

Our analysis, which is not intended to be exhaustive, concludes with some observations concerning the internal consistency of the selected aspects of the legal framework.

FEDERAL MANAGEMENT AND OVERSIGHT

FEDERAL RULEMAKING

As indicated above, one purpose of Chapter 1 is to "free the schools of unnecessary Federal supervision, direction, and control" and to free educators "from overly prescriptive regulations and administrative burdens which are not necessary for fiscal accountability and make no contribution to the instructional program." §552 of Chapter 1 (20 U.S.C. §3801). Consistent with this purpose, ECIA places limitations on federal rulemaking. First, ECIA indicates that a GEPA provision (§408(a)(1)) concerning authority to promulgate federal regulations is superseded by §591(a) of ECIA. §596(b)(1) of ECIA (20 U.S.C. §3876(b)(1)).[14]

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[13] This study, "A Study of Targeting Practices Used in the Chapter 1 Program", was conducted by SRA Technologies under ED contract number 400-85-1016.

Second, ECIA authorizes the Secretary to issue regulations and defines the scope of this rulemaking authority. The Secretary is authorized to issue:

- regulations "relating to the discharge of duties specifically assigned to the Secretary under" ECIA;
- regulations "relating to proper fiscal accounting for funds appropriated under . . . [ECIA] . . . and the method of making payments authorized under" ECIA; and
- regulations "which are deemed necessary to reasonably insure that there is compliance with the specific requirements and assurances required by" ECIA.[15]

§591(a) of ECIA (20 U.S.C. §3871(a)).

Third, ECIA expressly limits the Secretary's rulemaking authority:

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[14] This GEPA provision, which does not apply to Chapter 1, states:

> Each administrative head of an education agency . . . is authorized --
>
> (1) to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by the agency of which he [or she] us head.

§408(a)(1) of GEPA (20 U.S.C. §1231b-2(a)(1).

[15] This provision could be interpreted broadly or narrowly with respect to the Secretary's discretion to decide whether rulemaking in a particular area is "necessary to reasonably insure" compliance with "the specific requirements and assurances required by" ECIA.

> In all other matters relating to the details of planning, developing, implementing, and evaluating programs and projects by State and local educational agencies the Secretary shall not issue regulations, but may consult with appropriate State, local and private education agencies and, upon request, provide technical assistance, information, and implementation of effective instructional programs and to otherwise assist in carrying out the purposes of this subtitle.

§591(b) of ECIA (20 U.S.C. §3871(b)) (Emphasis added)[16]

Fourth, the statute provides that regulations issued pursuant to ECIA "shall not have the standing of a Federal statute for the purposes of judicial review." §591(c) of ECIA (20 U.S.C. §3871(c)). One study, prepared for the House Subcommittee on Elementary, Secondary, and Vocational Education, has described the significance of this provision as follows:

> This could make rulings in any future court cases less predictable, because it leaves courts more leeway to come up with their own interpretations of what the statute meant. The fact that the regulations mostly paraphrase the statute and provide little additional guidance, and the Nonregulatory Guidance has no legal standing, may also contribute to the unpredictability of future court decisions.[17]

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[16] ECIA does not refer to another source of rulemaking authority for the Secretary. Under §414(a) of the Department of Education Organization Act (DEOA) (20 U.S.C. §3474(a)), the Secretary "is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department."

[17] Report on Changes Under Chapter 1 of the Education and Consolidation Improvement Act, prepared for the Subcommittee on Elementary, Secondary and Vocational Education, U.S. House of Representatives, Serial No. 99-B, 99th Cong. 1st Sess. (1985), at 51.

Fifth, ECIA expressly supersedes many GEPA provisions and renders others inapplicable to Chapter 1. §596 of ECIA (20 U.S.C. §3876). As a related matter, the Secretary has determined that most of the EDGAR regulations, which are authorized by GEPA, do not apply to Chapter 1.[18]

Section 431 of GEPA (20 U.S.C. §1232), however, applies to Chapter 1, just as it did to Title I. This provision indicates, in part, that:

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[18] EDGAR has several parts. Part 74 (34 CFR Part 74) governs administration of grants. Part 76 (34 CFR Part 76) governs State operated programs. Part 78 (34 CFR Part 78) governs the Education Appeal Board. The early Chapter 1 regulations indicate that the EDGAR regulations concerning State operated programs "do not apply to programs under Chapter 1," except for 34 CFR §74.62 which concerns non-Federal audits. 47 FR 52343 (November 19, 1982). Explanatory remarks appended to the regulations responded to several commenters who "felt that not requiring compliance with 34 CFR Part 76 might result in many inefficiently managed projects." 50 FR 18428 (April 30, 1985). ED responded as follows:

> The decision to make 34 CFR Part 76, as well as nearly all the other EDGAR provisions, inapplicable to Chapter 1 was intended to allow States greater flexibility in administering this program than they had under Title I. Even though EDGAR does not apply, agencies must use fiscal control and fund accounting procedures that ensure the proper disbursement of, and accounting for Chapter 1 funds, according to Section 596(a) of the ECIA. Agencies may meet this requirement by relying on the provisions in EDGAR or by applying equivalent procedures of their own.

50 FR 18428 (April 30, 1985) The Chapter 1 regulations implementing the 1983 Technical Amendments indicate that practice and procedure before the Education Appeal Board are to be governed by Part 78 of EDGAR. §204.50, 50 FR 18414 (May 19, 1986).

- the term "regulation" means "any rules, regulations, guidelines, interpretations, orders or requirements of general applicability prescribed by the [Secretary];"

- no proposed regulation prescribed for the administration of any applicable program may take effect until thirty days after it is published in the Federal Register;

- during the thirty day period following this publication, the Secretary must usually offer interested persons an opportunity to comment on the proposed regulations; and

- all regulations "shall be uniformly applied and enforced through the fifty States."

The Chapter 1 regulations do not contain a section on the Secretary's rulemaking authority under Chapter 1. The preface to these regulations, however, reflects the intent to deregulate:

> Consistent with the Administration's efforts to reduce regulatory burden while increasing State and local flexibility, these regulations address a limited number of issues. As a result, these regulations do not prescribe specific methods for implementing each of the changes that Chapter 1 makes in previous Title I requirements . . . . To the extent feasible, the Secretary will give deference to an SEA's interpretation of a Chapter 1 requirement if that interpretation is not inconsistent with the Chapter 1 statute, legislative history, and regulations.

47 FR 52341-52342 (November 19, 1982). The preface continues:

> Although the Secretary chooses not to impose any additional regulatory requirements concerning Chapter 1 program design, the Secretary is aware that many State and local officials have requested guidance regarding implementation of Chapter 1 programs. As a result the Secretary is preparing a final document designed to provide further nonregulatory guidance to assist State and local officials in implementing Chapter 1.

Id. The June 1983 NRG was subsequently issued with the following qualification:

> . . . the non-regulatory guidance . . . is addressed primarily to SEAs. The LEAs should rely on these interpretations only to the extent that they have been adopted by the SEA. The interpretations and policies in [the NRG] are binding on all officials of the U.S. Department of Education (including the Inspector General). They are not binding, however, on SEAs or LEAs.

Chapter 1 NRG at i (June 1983).[19]

The 1983 Technical Amendments also do not address the Secretary's rulemaking authority under Chapter 1. They do, however, reflect the resolution of a protracted dispute between ED and the Congress about which GEPA provisions should apply to Chapter 1. The resolution is contained in §596 of ECIA (20 U.S.C. §3876), which indicates which GEPA provisions are superseded by Chapter 1 and which apply to Chapter 1. The regulations implementing the Technical Amendments finally clarified the extent to which GEPA applied to Chapter 1. 51 FR 18407 (May 19, 1986).

The informal legal framework contains examples of how ED has addressed the inapplicability of EDGAR to Chapter 1 and the silence of the Chapter 1 regulations on certain issues. In a 1983 letter responding to a State request for guidance about allowable costs, ED said:

> There are no required cost principles for Chapter 1 programs. However, in the preamble to the final

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[19] The December 1986 NRG, at ii, contains a similar formulation, but states, in part, "LEAs may rely on this guidance unless it is inconsistent with guidance provided by the SEA."

> Chapter 1 regulations, the Secretary stated that, while not required to do so, States continuing to comply with the provisions of 34 CFR 74 [EDGAR] will be considered to be in compliance with fiscal control and fund accounting procedures required for Chapter 1.

ED also pointed to the EDGAR regulations in a 1984 letter to a State which requested guidance about allowable costs:

> In the absence of procedures to address this issue, I will use the Education Department General Administrative Regulations (EDGAR) for guidance to respond to your questions. While not required, these regulations may be used by States to meet the financial requirements of Chapter 1 programs.

In another 1984 letter, ED responded to an inquiry about the use of Chapter 1 funds for staff training. Since the Chapter 1 regulations do not address this issue, ED turned to the January 1981 Title I regulations and said:

> Under Title I . . . the Department issued regulations regarding the use of funds for training purposes. Section 200.75 of those regulations restricted that kind of activity to training --
>
> (1) Directly related to Title I services to be provided during the school year in which the training is being provided or in the next school year;
>
> (2) Directly related to the functions that the persons receiving the training provide for the children participating in the Title I project; and
>
> (3) Necessary to meet the needs of the participating children.
>
> Although those regulations are no longer in effect, they may be used as guidance in determining allowable costs under Chapter 1.

Letters such as these indicate the limitations of the deregulation effort reflected in ECIA. ED sometimes has to draw upon the "inapplicable" EDGAR regulations and even the old Title I regulations when needed for guidance not contained in the legal framework for Chapter 1. Even the 1986 NRG uses excerpts from the January 1981 Title I regulations to provide guidance in the areas of comparability and evaluation.

In general, the legal framework for federal rulemaking appears to be internally consistent. There are, however, two issues which are of interest. The first concerns §431(a)(1) of GEPA (20 U.S.C. §1232(a)(1)) which defines the term "regulation" as meaning "any rules, regulations, guidelines, interpretations, orders, or requirements of general applicability prescribed by" the Secretary (emphasis added). A proposed "regulation" must be published in the Federal Register for comment before it takes effect. §431(b)(1) of GEPA (20 U.S.C. §1232(b)(1)). The NRG appears to be a set of "guide-lines", or at a minimum, a collection of "interpretations". Does the NRG constitute "guidelines" or "interpretations" within the meaning of "regulation" as defined in §431(a)(1) of GEPA? Could a State or an LEA assert in court or before the Education Appeal Board that the NRG has no effect because it was not published in the Federal Register in accordance with §431 of GEPA? Does it matter, given that ED has said the NRG is not binding on SEAs or LEAs unless adopted by an SEA? The answers to these questions are not self-evident.

The second issue of interest concerns §431(c) of GEPA (20 U.S.C. §1232(c)) which mandates that "[a]ll such [ED] regulations shall be uniformly applied and enforced throughout the fifty States." Is ED's frequent refusal to develop standards for inclusion in the Chapter 1 regulations consistent with Congressional intent concerning uniform application and enforcement? Does the NRG, which is binding on ED, but not SEAs or LEAs (unless adopted by an SEA), advance the Congressional interest in uniform application and enforcement? How does the "inapplicability" of EDGAR (unless adopted by an SEA) correspond to the mandate that ED regulations be uniformly applied and enforced? To the extent that Congress is concerned with uniform application and enforcement of ED regulations, these may be questions of interest.

FEDERAL RECEIPT OF STATE ASSURANCES

Chapter 1 does not require that a State application or State plan be submitted to the Secretary.[20] The only requirement for State participation is that an SEA give the Secretary two written assurances. The SEA must assure the Secretary that:

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[20] Under Title I, a State had to have on file with the Secretary an application which contained (1) "satisfactory assurances that the [SEA] will comply with all applicable requirements" of the Title I statute and regulations, GEPA, and EDGAR and (2) any additional information the Secretary considered necessary to make the findings required under §182 of Title I (concerning approval of State applications). States also had to submit the monitoring and enforcement plan required by §171 of Title I. Under §182 of Title I, the Secretary could not approve a State application until he/she made specific findings, in writing, that:

(1) the application and the State monitoring and enforcement plan complied with Title I and
(2) the Secretary was satisfied with the assurances in the Title I application and that the assurances contained in the general application under §435 of GEPA (where applicable) would be carried out.

- the control of funds provided under each program and title to property acquired with program funds will be in a public agency, or in a nonprofit private agency, institution, or organization if the statute authorizing the program provides for grants to such entities, and that the public agency or nonprofit private agency, institution, or organization will administer such funds and property; and
- the State will use fiscal control and fund accounting procedures that will ensure proper disbursement of, and accounting for, Federal funds paid to the State under each program.

§435(b)(2) and (b)(5) of GEPA (20 U.S.C. §1232d(b)(2) and (b)(5) applied to Chapter 1 by §596(c) of ECIA (20 U.S.C. §3876(c)). The Chapter 1 regulations repeat this requirement and add that the "assurances remain in effect for the duration of the SEA's participation in Chapter 1." §200.10, 47 FR 52345 (November 19, 1982).

The June 1983 NRG states, at 3:

> An SEA meets these requirements if it submits to the Secretary a document that indicates that it will comply with these assurances in administering funds

> provided under Chapter 1. An SEA need only submit these assurances for the first year the SEA participates in the Chapter 1 program. Such assurances will remain in effect for the duration of the SEA's participation in Chapter 1.
>
> Unlike Title I, Chapter 1 does not require an SEA to submit a State application in order to receive Chapter 1 funds for its LEAs.

The legal framework for federal receipt of State assurances is consistent.

FEDERAL MONITORING

Chapter 1 does not *expressly* require that the Secretary monitor SEA or LEA implementation of Chapter 1. The Secretary, however, is required to "make payments to [SEAs] for grants made on the basis of entitlements" created under Title I and is authorized to withhold payments when he/she finds, after notice and an opportunity for a hearing, that there has been a "failure to comply substantially" with Chapter 1 requirements. §553 of Chapter 1 (20 U.S.C. §3802) and §592(a) of ECIA (20 U.S.C. §3872(a)).

The Secretary, however, is ultimately responsible for ensuring that Chapter 1 funds are expended in compliance with the law. The authority to monitor the expenditure of Chapter 1 funds is inherent in this responsibility. The extent to which this authority is exercised appears to be a matter of the Secretary's discretion.

Neither the Chapter 1 regulations nor the June 1983 or December 1986 NRG contain references to federal monitoring (i.e., program reviews) of Chapter 1.

The informal legal framework does contain a draft eleven-page ED document entitled "Guide to On-Site Chapter 1, ECIA Program Reviews in SEAs and LEAs" (August 1985) (the ED Program Review Guide). This is an internal document used by ED staff who conduct program reviews.[21]

The topical coverage of the Program Review Guide includes:

- o Fiscal Management (allocations, reallocation, carryover, control of funds, indirect costs, property control, audits, and travel costs)
- o SEA Monitoring of LEA (application guidelines, monitoring, and LEA reports)
- o Program Requirements (attendance areas, child selection, comparability, parental involvement, local N or D, replacement model, maintenance of effort, and evaluation)

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[21] ED has prepared annual summaries of Chapter 1 program reviews. See, e.g., "Chapter 1 of the ECIA: A Compilation and Overview of the Fiscal Year 1984 State Program Reviews" (September 1984) and "Summary of Chapter 1 State Program Reviews" (November 1985).

- SEA Administrative Funds (Chapter 1 staff, funds control, SEA indirect costs, and control of staff)
- Chapter 1 Services to Private School Children (consultation, comparability of programs, control by LEAs, needs assessment, equal expenditures, and supplement, not supplant).

Under each topic in the Program Review Guide, there are brief notations about "What to review," "possible problems," and "statutory and regulatory citations." Some of these notations will be discussed in subsequent sections of this paper, e.g., comparability, supplement not supplant, SEA monitoring, etc.

The Program Review Guide is apparently used in conjunction with an ED manual, "DCRP and the Monitoring of Chapter 1 Programs" (September 1986). This detailed procedural manual includes, as Appendix E, a 49-page monitoring guide which federal monitors can fill out. The topical coverage of the SEA portion of the monitoring guide includes:

- financial management;
- application review and approval procedures;
- monitoring LEAs; and
- technical assistance/program improvement.

The topical coverage of the LEA portion of the monitoring guide includes:

- target area selection;
- annual needs assessment;
- program design and implementation;
- evaluation;

- o consultation with parents and teachers;
- o participation of children in private schools;
- o maintenance of effort;
- o comparability of services;
- o staff development;
- o fiscal management; and
- o project management and supervision.

Subsequent sections of this paper will discuss relevant portions of the 1986 monitoring guide, e.g., SEA monitoring, evaluation, parent involvement, comparability, etc.

The 1985 Program Review Guide and the 1986 monitoring guide have similar, but not identical topical coverage. The latter is much more detailed than the former. The content of the documents is generally consistent with the legal framework.

FEDERAL AUDITS

The legal framework for federal audits includes provisions concerning:

- o the responsibility for audits;
- o the Single Audit Act;
- o audit due process and appeal rights; and
- o the "grant-back" provision.

These are described below.

The Responsibility for Audits

The Chapter 1 statute provides authority for the Secretary to conduct audits:

> Each [SEA] shall keep such records and provide such information to the Secretary as may be required for fiscal audit . . . (consistent with the responsibilities of the Secretary under this Chapter).

§555(d) of Chapter 1 (20 U.S.C. §3804(d). ED has said §555(d) "contains authority for the Secretary to conduct audits." 47 FR 52361 (November 19, 1982).[22] Authority for audits and access to records of the Chapter 1 program are also provided by the Intergovernmental Cooperation Act of 1968 (42 U.S.C. §4212) and the Inspector General Act of 1978 (5 U.S.C. App.)[23]

The duties and responsibilities of the ED Inspector General include the following:

- "to provide policy direction for and to conduct, supervise and coordinate audits and investigations relating to the programs and operations" of ED;
- to "comply with standards established by the Comptroller General of the United States for audits of Federal establishments, organizations, programs, activities, and functions;" and
- to "take appropriate steps to assure that any work performed by non-Federal auditors complies with the standards established by the Comptroller General."

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[22] ED has prepared annual summaries of final audit determinations. See, e.g., "Selected Title I and Chapter 1 Final Audit Determinations from Fiscal Year 1984" and "Selected Title I and Chapter 1 Final Audit Determinations from Fiscal Year 1985."

[23] The Inspector General Act transferred to ED all applicable Inspector General functions of the Department of Health, Education and Welfare. §9(a)(1)(D) of the Inspector General Act (5 U.S.C. App.)). The Department of Education Organization Act established an Inspector General and an Office of Inspector General in ED. §202(c) and §212 of the Department of Education Organization Act (20 U.S.C. §3412(c) and §3422).

§4(a)(1) and (b)(1) and (b)(3) of the Inspector General Act (5 U.S.C. App.)[24]

The early Chapter 1 regulations describe Federal responsibilities for audits and access to records as follows:

> (a) (1) For the purpose of evaluating and reviewing the use of Chapter 1 funds --
> (i) The Inspector General of the Department, authorized Department officials, and the Comptroller General shall have access to any books, accounts, records, correspondence, or other documents that --
> (A) Are related to programs assisted with Chapter 1 funds; and
> (B) Are in the possession, custody, or control of SEAs or LEAs; and
> (ii) The Inspector General of the Department and the Comptroller General are authorized to conduct audits.
>
> (2) An SEA shall repay to the Department the amount of Chapter 1 funds determined by the audit not to have been spent in accordance with applicable law.

§200.57(a), 47 FR 52348 (November 19, 1981).[25]

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[24] Under Title I, the Inspector General was required to provide for audits of grants made under Title I. These audits had to determine both (1) "the fiscal integrity of grant or subgrant financial transactions and reports;" and (2) "the compliance with applicable statutes, regulations and terms and conditions of the subgrant." §185(a) of Title I (20 U.S.C. §2385(a)). The Secretary was responsible for resolving federal Title I audits and was required to "adopt procedures to assure timely and appropriate resolution of audit findings and recommendations . . . ." §185(b) of Title I (20 U.S.C. §2385(b)). These procedures had to include (1) timetables for each step of the audit resolution process and (2) an audit appeals process. Id.

[25] The early Chapter 1 regulations also gave the Secretary discretion with respect to the compromise of audit claims and specified several factors the Secretary may take into account. §200.58, 47 FR 52349 (November 19, 1982). These regulations and the factors were later amended slightly, §204.12, 50 FR 18417 (April 30, 1985), and then amended again §204.12, 51 FR 18412 (May 19, 1986). The Secretary now considers the probability of the audit claim being upheld "to be the most important of the factors." Id.

The June 1983 NRG, at 19, discusses the above regulation in the following terms:

> Section 200.57(a) expressly states that the Inspector General of the Department and the Comptroller General of the United States have the authority to conduct audits of the use of Chapter 1 funds. The SEAs are required to repay to the Department any funds determined by Federal audits not to have been spent in accordance with applicable law.

The 1983 Technical Amendments do not make any modifications concerning federal authority to conduct audits.

The Single Audit Act

The Single Audit Act, which primarily concerns audit requirements for State and local governments, was enacted in 1984.[26] This Act creates additional audit-related responsibilities for Federal "cognizant agenc[ies]."[27] These responsibilities are also set forth in OMB Circular A-128 (Audits of State and Local Governments). 50 FR 32053 (August 8, 1985). When ED revised portions of the Chapter 1 regulations in April 1985, the regulations did not include any reference to the Single Audit Act because ED was planning to issue separate regulations to implement the Single Audit Act.[28]

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[26] P.L. 98-502; 31 U.S.C. §§7501-7507. -

[27] A "cognizant agency" is the Federal agency assigned by OMB to carry out the Federal responsibilities for implementing and monitoring applicable Single Audit Act requirements. §74.62, Appendix G, para. 3a., 50 FR 37537 (September 13, 1985). As of the date of the publication of the Single Audit Act regulations, ED was the "cognizant agency" for school districts, "except for those in Arkansas, Georgia, Maryland, Minnesota, Oregon, Utah, and the Commonwealth of Puerto Rico" which "have been assigned to the Department of Agriculture." 50 FR 37356 (September 13, 1985). The same regulatory comment also indicates that, because of the special relationship between SEAs and LEAs, federal agencies will generally work through SEAs in fulfilling their cognizant agency audit responsibilities for LEAs.

The separate regulations implementing the Single Audit Act and OMB Circular A-128 were issued in September 1985. These regulations establish audit requirements for State and local governments that receive Federal aid and define "Federal responsibilities for implementing and monitoring those requirements." §74.62, Appendix G, para. 1, 50 FR 37357 (September 13, 1985).

The Single Audit Act regulations assign seven responsibilities to the Federal "cognizant agency:"

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[28] The revised portions of the Chapter 1 regulations describe Federal audit responsibilities as follows:

> (1)(i) For the purpose of evaluating and reviewing the use of Chapter 1 funds the Secretary and the Comptroller General of the United States and their authorized representatives, shall have access to any records and personnel that may be related or pertinent to programs assisted with Chapter 1 funds.
>
> (ii) Any agency that receives Chapter 1 funds shall agree to cooperate with the Inspector General of the Department in the conduct of audits authorized by the Inspector General Act of 1978, including providing access to information and access to agency personnel for the purpose of obtaining explanations of the information.
>
> (2) Unless the Secretary decides to compromise an audit claim under §204.12(b), an SEA shall repay to the Department the amount of Chapter 1 funds that the Department determines after an audit was not spent in accordance with applicable law.

§204.11, 50 FR 18416 (April 30, 1985).

> (1) Ensure that audits are made and reports are received in a timely manner and in accordance with the requirements of [the appendix to the regulations]
>
> (2) Provide technical advice and liaison to State and local governments and independent auditors.
>
> (3) Obtain or make quality control reviews of selected audits made by non-Federal audit organizations, and provide the results, when appropriate, to other interested organizations.
>
> (4) Promptly inform other affected Federal agencies and appropriate Federal law enforcement officials of any reported illegal acts or irregularities. . . . also inform State or local law enforcement and prosecuting authorities, if not advised by the recipient, of any violation of law within their jurisdiction.
>
> (5) Advise the recipient of audits that have been found not to have met the requirements set forth in [the appendix to the regulations]. In such instances, the recipient will be expected to work with the auditor to take corrective action. If corrective action is not taken, the cognizant agency shall notify the recipient and Federal awarding agencies of the facts and make recommendations for follow-up action. Major inadequacies or repetitive substandard performance of independent auditors shall be referred to appropriate professional bodies for disciplinary action.
>
> (6) Coordinate, to the extent practicable, audits made by or for Federal agencies that are in addition to the audits made pursuant to [the appendix to the regulations] so that the additional audits build upon such audits.
>
> (7) Oversee the resolution of audit findings that affect the programs of more than one agency.

§74.62, Appendix G, para. 9b(1)-(7), 50 FR 37630 (September 13, 1985).

The Single Audit Act regulations also provide that an audit made in accordance with applicable requirements "shall be used in lieu of any financial or financial compliance audit required under individual Federal assistance programs" §74.62. Appendix G, para. 8, 50 FR 37359 (September 13, 1985). The regulations indicate that ED may rely on such audits, but may also conduct additional audits. As the regulations state:

> To the extent that a single audit provides Federal agencies with information and assurances they need to carry out their overall responsibilities, they shall rely upon and use such information. However, a Federal agency shall make any additional audits which are necessary to carry out its responsibilities under Federal law and regulation. Any additional Federal audit effort shall be planned and carried out in such a way as to avoid duplication.

Id.

The Single Audit Act regulations also discuss sanctions available to ED when there is "continued inability or unwillingness to have a proper audit":

> The Single Audit Act provides that no cost may be charged to Federal Assistance programs for audits required by the Act that are not made in accordance with this appendix. In cases of continued inability or unwillingness to have a proper audit, Federal agencies must consider other appropriate sanctions including:
>
> --Withholding a percentage of assistance payments until the audit is completed satisfactorily,
>
> --Withholding or disallowing overhead costs, and
>
> --Suspending the Federal assistance agreement until the audit is made.

§74.62, Appendix G, para. 15, 50 FR 37361 (September 13, 1985).

The 1986 Chapter 1 regulations implementing the 1983 Technical Amendments made minor editorial changes in the Federal audit responsibilities section. This was done to make the language consistent with the corresponding regulation that applies to Chapter 2 of ECIA. 51 FR 18405 (May 19, 1986). The current Chapter 1 regulation states:

> (1)(i) For the purpose of evaluating and reviewing the use of Chapter 1 funds, the Secretary and the Comptroller General of the United States, and their authorized representatives, shall have access to any records and personnel that may be related or pertinent to programs assisted with Chapter 1 funds.
> (ii) Any agency that receives Chapter 1 funds shall cooperate with the Inspector General of the Department in the conduct of audits authorized by the Inspector General Act of 1978, including providing access to information and access to agency personnel for the purpose of obtaining explanations of the information.
>
> (2) An SEA shall repay to the Department the amount of Chapter 1 funds that the Department determines after an audit was not spent in accordance with applicable law.

§204.11, 51 FR 18412 (May 19, 1986).

Audit Due Process and Appeal Rights

There are due process and appeal rights concerning final audit determinations. Section 452 of GEPA (20 U.S.C. 1234a) governs audit determinations and provides that, whenever the Secretary determines that an expenditure not allowable under Chapter 1 (or other applicable programs) has been made by a SEA or by a LEA, or that a SEA or LEA has otherwise failed to discharge its obligations to account for funds, the Secretary must "give such State or [LEA] written notice of a final audit determination" and must "at the same time notify such State or agency of its right to have such determination reviewed by" the Education Appeal Board. See §§200.90-200.103, 47 FR 52351-52353 (November 19, 1982); renumbered as §§204.40-204.53, 50 FR 18417-18419 (April 30, 1985); §§204.43, 204.50, 204.53, 51 FR 18414 (May 19, 1986).

The "Grant Back" Provision

GEPA also provides guidance about the use of funds recovered following a final federal audit determination. Section 456(a) of GEPA (20 U.S.C. §1234e(a)) provides that, whenever funds have been recovered following a final audit determination, the Secretary "may consider those funds to be additional funds available for that program and may arrange to repay to the state or the local agency affected by that action not to exceed 75 percent of those funds . . . ." If the choice is to "grant back" such funds, the Secretary must make several different determinations before this can be done. The Secretary must determine that:

> (1) the practices or procedures of the state or local agency that resulted in the audit determination have been corrected, and that the state or local agency is in all other respects in compliance with the requirements of [Chapter 1];
>
> (2) the state or local agency has submitted to the [Secretary] a plan for the use of those funds pursuant to the requirements of [Chapter 1] and, to the extent

> possible, for the benefit of the population that was affected by the failure to comply or by the misexpenditures that resulted in the audit exception; and
>
> (3) the use of those funds in accordance with that plan would serve to achieve the purposes of the program under which the funds were originally granted.

§456(a)(1)-(3) of GEPA (20 U.S.C. §1234e(a)(1)-(3)).[29]

If the Secretary intends to exercise the authority to "grant back" funds recovered following a final audit determination, the Secretary must, at least 30 days prior to entering into such an arrangement, publish in the Federal Register (1) notice of the intent to do so and (2) the terms and conditions under which the payments will be made. "Interested persons shall have an opportunity for at least 30 days to submit comments to the Secretary regarding the proposed arrangement." §456(d) of GEPA (20 U.S.C. §1232e(d)).

The legislative history emphasizes that any such repaid funds must be "use[d] for the beneficiaries originally intended to be served." S. Rep. No. 95-856, 95th Cong. 2d Sess. (1978) at 159.

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[29] Any such payments "shall be subject to such other conditions as the [Secretary] deems necessary to accomplish the purposes of [Chapter 1], including: (1) the submission of periodic reports on the use of [such] funds . . . and (2) consultation by the State or local agency with parents or representatives of the population that will benefit from the payments." §456(b)(1) and (2) of GEPA (20 U.S.C. §1234e(b)(1) and (2)).

The same report indicates that the Secretary's authority to make such payments should not be construed as an automatic "grant back":

> a state or [LEA] would not be assured of the relief since before providing this relief the [Secretary] would have to make a finding (1) that the practices leading to the audit action had been corrected; (2) that the state or [LEA] had submitted a plan for the proper use of the funds and for their restoration, for the benefit of the population affected by the misexpenditure; and (3) that the granting back of a portion of the funds would serve to achieve the purposes of the program. [Id. at 122] [Emphasis added.]

The legal framework for federal auditing includes, among other laws, the Inspector General Act, Chapter 1, the Single Audit Act, and GEPA. This portion of the legal framework appears to be mutually and internally consistent. ED's use of separate regulations for the Single Audit Act has facilitated this consistency.

FEDERAL ENFORCEMENT MECHANISMS

The Secretary can use monitoring, auditing, audit resolution, and compromise or collection of audit claims as enforcement mechanisms. The Secretary can also use the by-pass provision to insure that educationally deprived children in private schools receive Chapter 1 services. §557 of Chapter 1 (20 U.S.C. §3806).[30] In addition, the Secretary is authorized to withhold payments of Chapter 1 funds under §592 of ECIA (20 U.S.C. §3872) and to issue "cease and desist" orders under §454 of GEPA (20 U.S.C. §1234c).

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[30] This provision is discussed in the section on services to children in non-public schools.

Withholding of Payments

Chapter 1 authorizes the Secretary to withhold payments of Chapter 1 funds.[31] If the Secretary intends to withhold payments, the Secretary must first give the SEA "reasonable notice and opportunity for a hearing" §592(a) of ECIA (20 U.S.C. §3872(a)); §204.44(b), 50 FR 18418 (April 30, 1985).[32] The SEA may request a hearing before the Education Appeal Board. §451 of GEPA (20 U.S.C. §1234); §§204.45-204.50, 50 FR 18418-18419 (April 30, 1985) and §§204.43, 204.50, and 204.53 51 FR 18414 (May 19, 1986).

After such due process, the Secretary must determine whether "there has been a failure to comply substantially with any assurances required to be given" or with "conditions required to be met" under ECIA. §592(a) of ECIA. If the Secretary makes either of these findings adverse to the SEA, then the Secretary must notify the SEA of the finding(s) and must notify the SEA

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[31] The Secretary was authorized to withhold payments of Title I funds under Title I. §186(a) of Title I (20 U.S.C. §2836(a)). Under §186(c) of Title I (20 U.S.C. 2836(c)), the Secretary could suspend the initiation or continuance of a withholding action by entering into a compliance agreement. ECIA does not contain a provision for a compliance agreement.

[32] Section 453 of GEPA (20 U.S.C. 1234b), which authorizes the Secretary to withhold or suspend payments (pending the outcome of a withholding proceeding) is superseded by §592 of ECIA. §596(b) of ECIA (20 U.S.C. §3876(b)). Section 592 of ECIA does not authorize the Secretary to suspend payments pending the outcome of a withholding proceeding.

> that beginning sixty days after the date of such notification, further payments will not be made to the State under...[Chapter 1]...(or, in [the Secretary's] discretion, that the [SEA] shall reduce or terminate further payments under...[Chapter 1]...to specified [LEAs] or State agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply.

Id.

Until the Secretary is so satisfied,

> (1) no further payments shall be made to the State under...[Chapter 1] or (2) payments by the [SEA] under ...[Chapter 1]...shall be limited to [LEAs] and State agencies not affected by the failure, or (3) payments to particular [LEAs] shall be reduced, as the case may be.

Id.

If a State is dissatisfied with the Secretary's decision to withhold payments, the State may seek judicial review within sixty days after notice of the Secretary's decision. §593(a) of ECIA (20 U.S.C. §3873(a). ECIA creates a presumption of SEA and LEA compliance for purposes of judicial review, but findings of fact by the Secretary can overcome this presumption. §593(b) of ECIA (20 U.S.C. §3873(b).[33]

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[33] Section 455 of GEPA (20 U.S.C. §1234d), which governs, in part, judicial review of the Secretary's decision to withhold payments, is superseded by §593 of ECIA. §596(b) of ECIA (20 U.S.C. §3876(b)). Section 455 of GEPA does not contain a presumption of SEA and LEA compliance.

Cease and Desist Orders

Whenever the Secretary "has reason to believe that any State or [LEA] that receives funds under [Chapter 1] has failed to comply substantially with any requirement of law applicable to such funds," the Secretary (in lieu of proceeding under the authority to withhold payments) "may issue and cause to be served" upon a State or LEA a complaint. §454(a) of GEPA (20 U.S.C. §1234c(a)). The complaint must state the charges upon which the Secretary's belief is based and must contain a notice of hearing before the Education Appeal Board at least thirty days after service of the complaint. Id.; §204.44(c), 50 FR 18418 (April 30, 1985).

At the hearing the State or LEA may show cause why the Education Appeal Board should not order the State or LEA to "cease and desist from the violation of law charged in the complaint." §454(b) of GEPA (20 U.S.C. §1234c(b)); §204.54, 50 FR 18419 (April 30, 1985). If, in accordance with required procedures, the Board finds a "violation of any requirement of law as charged in the complaint," it must issue a cease and desist order which becomes final on the sixtieth day after service unless the state files a petition for judicial review. §454(c) and (d) of GEPA (20 U.S.C. §1234c(c) and (d); see §204.55, 50 FR 18419

(April 30, 1985).[34] Cease and desist orders can be enforced by withholding or by referral to the Attorney General. §454(e) of GEPA (20 U.S.C. §1234c(e)); see §204.56, 50 FR 18419 (April 30, 1985).

The legal framework for federal withholding of Chapter 1 funds and cease and desist orders appears to be consistent except for the differing judicial review provisions. When judicial review of the Secretary's decision to withhold payments of funds is sought, §593(b) of ECIA creates a presumption of SEA and LEA compliance which can be overcome by findings of fact by the Secretary. When judicial review of a cease and desist order is sought, no such presumption operates because none is present in §455 of GEPA which governs judicial review of a cease and desist order. This inconsistency between the judicial review provisions may result from an oversight in legislative drafting or may reflect a conscious legislative choice. In either event, it is not a policy problem of major dimensions.

FEDERAL EVALUATION, REPORTING, AND RECORD KEEPING

Except for a one-time "National Assessment of Compensatory

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[34] Judicial review of a cease and desist order is governed by §455 of GEPA (20 U.S.C. §1234(d)), which does not contain a presumption of compliance for SEAs and LEAs. §596(b) of ECIA (20 U.S.C. §3876(b)).

Education,"[35] of which this paper is a part, Chapter 1 does not expressly impose on federal officials evaluation, reporting or record keeping duties.[36] GEPA, however, with exceptions, applies to Chapter 1 programs, and several GEPA provisions are relevant.

The most extensive requirement for program evaluation by federal officials is found in GEPA §417 (20 U.S.C. §1226c). Under §417(a) the Secretary is required to submit

> an annual evaluation report which evaluates the effectiveness of applicable programs (including compliance with provisions of law requiring the maintenance of non-Federal expenditures for the purposes of such applicable programs) . . . together with recommendations . . . for . . . improvement.

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[35] See §559 of Chapter 1, as amended by the 1983 Technical Amendments (20 U.S.C. §3808). The National Assessment must include:

> descriptions and assessments of the impact of (1) services delivered, (2) recipients of services, (3) background and training of teachers and staff, (4) allocation of funds (to school sites), (5) coordination with other programs, (6) effectiveness of programs on student's basic and higher order academic skills, school attendance, and future education, and (7) a national profile of the way in which local educational agencies implement activities described under section 556(b).

[36] Sections 183(g) and 188 of Title I, as amended by the Education Amendments of 1978, P.L. 95-561, had provided for submission to Congress of federal evaluation and program enforcement reports in 1980, 1982, and 1984. The Senate committee had recommended the latter, "[s]ince the evaluation report that the congress currently receives on an annual basis does not include any useful information demonstrating the quality of administration and enforcement by the Office of Education." S. Rep. No. 95-856, 95th Cong. 2d Sess. (1978) at 35.

With respect to "any evaluation report evaluating specific programs and projects," additional requirements must be met. These reports must:

> (A) set forth goals and specific objectives in qualitative and quantitative terms for all programs and projects assisted under the applicable program concerned and relate those goals and objectives to the purposes of such program;
>
> (B) contain information on the progress being made during the previous fiscal year toward achievement of such goals and objectives;
>
> (C) describe the cost and benefits of the applicable program being evaluated during the previous fiscal year and identify which sectors of the public receive the benefits of such program and bear the costs of such program;
>
> (D) contain plans for implementing corrective action and recommendations for new or amended legislation where warranted;
>
> (E) contain a listing identifying the principal analyses and studies supporting the major conclusions and recommendations in the report;
>
> (F) be prepared in concise summary form with necessary detailed data and appendicies, including tabulations of available data to indicate the effectiveness of the programs and projects by the sex, race, and age of its beneficiaries.

Under §417(b), annual reports required under subsection (a) also must include information on program evaluation activities of federal contractors or grant recipients:

> Each evaluation report submitted pursuant to subsection (a) shall contain: (1) a brief description of each contract or grant for evaluation of any program . . . any part of the performance of which occurred during the preceding year, (2) the name of

> the firm or individual who is to carry out the evaluation, and (3) the amount to be paid under the contract or grant.

Another GEPA provision, §419 (20 U.S.C. §1227), provides for Comptroller General program evaluations, upon congressional request. Under this provision the Comptroller General must respond to requests from congressional committees having jurisdiction over federal education programs, and must respond to the request of any member of these committees "to the extent personnel are available." In responding, the Comptroller General must

> (1) conduct studies of statutes and regulations governing such program; (2) review the policies and practices of Federal agencies administering such program; (3) review the evaluation procedures adopted by such agencies carrying out such program; and (4) evaluate particular projects or programs.

In addition, the Comptroller General "shall compile such data as are necessary" and

> shall report to the Congress at such times as he deems appropriate his findings with respect to such program and his recommendations for such modifications in existing laws, regulations, procedures and practices as will in his judgment best serve to carry out effectively and without duplication the policies set forth in education legislation relative to such program.

Subsection (b) of §419 directs the Comptroller General to "give particular attention" to federal agency contracts with private firms:

> In carrying out his responsibilities as provided in subsection (a), the Comptroller General shall give particular attention to the practice of Federal agencies of contracting with private firms, organizations, and individuals for the provision of a wide range of studies and services (such as personnel recruitment and training, program evaluation, and program administration) with respect to Federal education programs, and shall report to the heads of the agencies concerned and to the Congress his findings with respect to the necessity for such contracts and their effectiveness in serving the objectives established in education legislation.

A third GEPA provision requiring evaluation of educational programs by federal officials is §422(a)(3) (20 U.S.C. §1231a(a)(3)). This provision requires the Secretary to "collect data and information on applicable programs for the purpose of obtaining objective measurements of the effectiveness of such programs in achieving their purposes."

Several GEPA provisions require additional reports. Section 422(a)(1) and (2) (20 U.S.C. §1231a(a)(1) and (2)) require public dissemination of information on federal education programs. Section 422(a)(4) requires an annual report on "the condition of education in the Nation, . . . administration, utilization, and impact of applicable programs, . . . results of investigation and activities" by ED, and "facts and recommendations" serving the purposes for which the Department was established.[37]

GEPA §423 (20 U.S.C. §1231b) requires the Secretary to prepare and transmit with ED's annual report a catalog of all federal education assistance programs. GEPA §424 (20 U.S.C. §1231b-1) requires annual publication of "a compilation of all innovative projects assisted under programs administered" by the Department. Under GEPA §406A(b) (§1221e-1a(b)), the Secretary must compile data and analyze reports submitted by the states under GEPA §406A(a) (discussed below, page 86). Under GEPA §400A(e)(3), the Secretary must submit to Congress, at least once every three years, a report on implementation of statutory requirements for control of paperwork, including "recommendations for revisions to Federal laws which the Secretary finds are imposing undue burdens on educational agencies and institutions."

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[37] The statute identifies this report as "the Commissioner's annual report." Section 301(a)(1) of the Department of Education Organization Act (DEOA) P.L. 96-88 (1979) (20 U.S.C. §3441(a)(1)) transferred to the Secretary of Education all functions of the Commissioner. Section 428 of DEOA (20 U.S.C. §3487) states that GEPA provisions apply to transferred functions "[e]xcept where inconsistent with the provisions of this Act." Section 426 of DEOA (20 U.S.C. §3486) requires annual preparation by the Secretary of "a single, comprehensive report." The prescribed contents of this report are similar in some respects, but not identical, to the contents of "the Commissioner's annual report" prescribed in GEPA §422(a)(4). One interpretation of the provisions would be that report contents prescribed in GEPA §422(a)(4) but having no counterpart in DEOA §426 need not be included in the Secretary's annual report. This view would argue that DEOA §426 provides for a "single" report and specifies its contents; thus, everything else in GEPA §422(a)(4) is "inconsistent" with DEOA §426. The legislative history might be viewed as supporting this interpretation, since the committee reports refer to the DEOA §426 report as the "successor to the Commissioner's annual report." S. Rep. No. 96-49, 96th Cong. 1st Sess. (1979) at 86. Another interpretation of the provisions would require the Secretary's annual report to include the contents specified in GEPA §422(a)(4). This view would maintain that the GEPA provision has not been repealed, its obligations have been transferred to the Secretary, and it is not "inconsistent" with DEOA to include these matters in the Secretary's report; rather, these matters merely add to, and do not "conflict" with, the contents specified in DEOA §426.

Two other laws provide for reports by federal officials. Section 426 of the Department of Education Organization Act, (20 U.S.C. §3486) requires annually "a single, comprehensive report . . . on the activities of the Department," including "a statement of goals, priorities, and plans" and "an assessment of the progress made toward" their attainment. The report must assess progress toward "more effective and efficient management of the Department" and toward "reduction of excessive or burdensome regulation and of unnecessary duplication and fragmentation in Federal educational programs." If necessary, recommendations for proposed legislation must be included. The report also must state the number and cost of Department contracts and subcontracts, and the number of non-Federal personnel they employ.

Finally, the Inspector General Act of 1978 requires the Department's Inspector General to prepare semiannual reports concerning the activities of her or his office. Under §4(a) of this Act, the Inspector General's duties, pertinent here,[38] include

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[38] Responsibility for audits and criminal investigations are outside the scope of this discussion.

"investigations relating to the programs and operations" of ED, "recommendations . . . concerning the impact of . . . legislation or regulations on the economy and efficiency in the administration of programs and operations," and recommendations for "promoting economy and efficiency in the administration of . . . programs and operations." Under §5 of the Act, the Inspector General's semiannual reports must include

> a description of significant problems, abuses, and deficiences relating to the administration of programs and operations, . . . a description of the recommendations for corrective action made by the Office, . . . [and] identification of each significant recommendation described in previous semiannual reports on which corrective action has not been completed.

No applicable regulations, or other formal or informal legal framework documents, elaborate the statutory provisions reviewed above. As a result, no questions of internal inconsistency arise.

STATE MANAGEMENT AND OVERSIGHT[39]

STATE RULEMAKING

When enacted in 1981, ECIA did not contain a statutory provision expressly authorizing State Chapter 1 regulations. The early Chapter 1 regulations, however, state:

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[39] Chapter 1 reduced the set-aside for State administration from 1.5 percent of the allocation to 1.0 percent of the allocation, but left intact the minimum amount for small States and outlying areas. §554(d) of Chapter 1 (20 U.S.C. §3803(d)).

> To carry out its responsibilities, an SEA may, in accordance with State law, adopt rules, regulations, procedures, guidelines, and criteria regarding the use of Chapter 1 funds, provided that those rules, regulations, procedures, guidelines, and criteria do not conflict with the provisions of --
>
> (1) Chapter 1;
> (2) The regulations in this part; or
> (3) other applicable Federal statutes and regulations.

§200.59(b), 47 FR 52349 (November 19, 1982).

In response to several comments which questioned the statutory basis for the State rulemaking regulation, ED referred to SEA application approval authority, along with other SEA administrative duties, and said:

> Section 556(b) of Chapter 1, which deals with applications by LEAs, provides that the SEA will approve an application from an LEA only if it contains certain assurances that are "satisfactory to the SEA." Section 555(c) and 556(a) of Chapter 1 also state the SEA's approval authority. Sections 557 and 558 impose important administrative duties on the SEA under Chapter 1. Thus, taken as a whole, Chapter 1 is regarded as a State-administered program. The State rulemaking authority in §200.59 is designed to implement these statutory provisions and is consistent with pertinent case law.

47 FR 52361 (November 19, 1982). (Emphasis added)

In referring to the Chapter 1 regulation on State rulemaking (§200.59(b)), the 1983 NRG states, at 19:

> Th[is] section authorizes an SEA, in carrying out this responsibility, to adopt rules, regulations, procedures, guidelines, and criteria regarding the use of Chapter 1 funds. Any such rules, regulations, procedures, guidelines, and criteria must be made in accordance with State law and must not conflict with Chapter 1, its legislative history, the regulations in Part 200, and any other applicable Federal statutes and regulations.

The 1983 Technical Amendments address the issue of State authority for Chapter 1 rulemaking by saying:

> Nothing in this subtitle shall be interpreted (1) to authorize State regulations, issued pursuant to procedures as established by State law, applicable to local educational agency programs or projects funded under this subtitle, except as related to State audit and financial responsibilities, or (2) to encourage, preempt, or prohibit regulations issued pursuant to State law which are not in conflict with the provisions of this subtitle. The imposition of any State rule or policy relating to the administration and operation of programs funded by this subtitle (including those based on State interpretation of any Federal law, regulation or guideline) shall be identified as State imposed requirement.

§591(d) of ECIA (20 U.S.C. §3871(d)).[40]

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[40] The Title I statutory provision for State rulemaking indicated that Title I did not prohibit SEA Title I rulemaking. It stated:

> Nothing in this title shall be deemed to prohibit a State educational agency from adopting rules, regulations, procedures, guidelines, criteria, or other requirements applicable to programs and projects assisted under this title if they do not conflict with the provisions of this title, with regulations promulgated by the Commissioner implementing this title,

[continued on next page]

This provision essentially says three things. First, ECIA should not be interpreted to authorize State regulations, except those "related to State audit and financial responsibilities". Second, ECIA does not encourage, preempt, or prohibit State regulations "issued pursuant to State law" which are not in conflict with ECIA. Third, a State must identify, as a State imposed requirement, "any State rule or policy relating to the administration of programs funded by. . .[ECIA] (including those based on State interpretation of any Federal law, regulation or guidelines)".

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40 [continued from previous page]

> or with other applicable Federal law. The Commissioner shall encourage a State educational agency, in adopting such rules, regulations, procedures, guidelines, criteria, or other requirements to recognize the special and unique needs and circumstances of the State and of each local educational agency in the State.

§165 of Title I (20 U.S.C. §2812). The Title I regulations indicated that, except in private school by-pass actions, the SEA could not use its rulemaking authority to prohibit any practice that was authorized under Title I. §200.121(b), 46 FR 5149 (January 19, 1981). The Title I regulations also included examples of acceptable SEA rulemaking. §200.122, 46 FR 5149 (January 19, 1981).

The legislative history says that the statutory provision "asserts the neutrality of the Federal statute on the issue of State rulemaking." S. Rep. No. 98-166, 98th Cong. 1st Sess. (1983) at 13; H. Rep. No. 98-51, 98th Cong. 1st Sess. (1983) at 8. With respect to the statutory language requiring identification of State imposed requirements, the legislative history explains that:

> . . . some LEAs have expressed concern that SEAs could use this certification procedure [application approval] as a mechanism for excessive regulation of LEA activities. This amendment . . . regarding identification of State rules addresses that concern.

Id.

ED revised the State rulemaking regulation after the 1983 Technical Amendments. The new regulation states:

> (1) Chapter 1 does not --
> (i) Authorize States to issue rules, regulations, or policies that apply to agencies operating Chapter 1 projects, except as related to State audits and financial responsibilities; or
> (ii) Encourage, preempt, or prohibit rules, regulations, or policies issued under State law.
>
> (2) If a State issues, pursuant to procedures established by State law, any rules, regulations, or policies relating to the administration and operation of programs funded under Chapter 1 (including those based on State interpretation of any Federal statute, regulation, or guideline), the State shall-
> (i) Ensure that the rules, regulations, or policies do not conflict with the provisions of --
> (A) Chapter 1;
> (B) The regulations in this part and 34 CFR Parts 200 through 203; or

> (C) Other applicable Federal statutes and regulations; and
> (ii) Identify the State rules, regulations, or policies as State-imposed requirements.

§204.13(b), 51 FR 18412 (May 19, 1986).

Comments on the proposed regulation expressed concern that the regulation could create problems between LEAs and SEAs and could restrict the ability of SEAs to administer the program. 51 FR 18419 (May 19, 1986). ED declined to change the proposed regulation and said, in part:

> The provisions in §204.13(b) accurately reflect the statutory provisions in section 591(d) of the ECIA that were added by Pub. L. 98-211. Section 591(d)(1) and §204.13(b)(1)(i) only specifically authorize a State to issue rules and regulations related to State audits and financial responsibilities.

Id. ED explained further:

> However, as indicated in section 591(d)(2) and §204.13(b)(1)(ii), *a State is not preempted or prohibited by Chapter 1 from issuing other rules when those rules are issued pursuant to State law* and are not in conflict with the provisions of Chapter 1 or other applicable Federal statutes and regulations. According to the House and Senate reports accompanying the technical amendments, Congress intended Chapter 1 to be neutral on the issue of State rulemaking. See H. Rep. 166, 98th Cong., 1st Sess. 8 (1983); S. Rep. 166, 98th Cong., 1st Sess. 13 (1983).

Id. (Emphasis added.)

Relying on this analysis and the legislative history, ED then offered a clarifying interpretation:

> Thus, *if State law permits, an SEA may issue regulations that relate to topics other than the State's audit and financial responsibilities.* As a result,

> the SEA's responsibility for ensuring that agencies that receive Chapter 1 funds in the State comply with applicable Chapter 1 requirements should not be impeded by §204.13(b).

Id. (Emphasis added.) ED did not include in the regulations any examples of State regulations that would be "in conflict with the provisions of Chapter 1."

The informal legal framework contains an example of how ED interprets the new statutory requirement that States identify State-imposed requirements. The example arises in the context of the "inapplicability" of EDGAR to Chapter 1. In a 1986 letter, ED responded to a State inquiry concerning an allowable costs provision in EDGAR. ED said, in part:

> You have based your request on the provision in . . . [EDGAR] . . . . As you are aware, however, the provisions in EDGAR do not apply to the Chapter 1 program. See 47 Fed. Reg. 52343 (Nov. 19, 1982). Thus, approval from the Department . . . is not required.
>
> A State may, of course, choose to follow the provisions in EDGAR in order to meet the fiscal control and fund accounting requirements of Chapter 1. The EDGAR provisions however, then become State-imposed rules, not Federal rules, and the State must identify such rules as State-imposed requirements.

The legal framework for State rulemaking appears to be internally consistent. It is, however, interesting that a State which chooses to follow an "inapplicable" EDGAR regulation must identify the federal regulation as a State-imposed requirement.

SEA APPROVAL OF LEA APPLICATIONS

The statute provides that an LEA may receive a Chapter 1 grant if "it has on file with the [SEA] an application which describes the programs and projects to be conducted . . . for a period of not more than three years" and if the LEA application "has been approved by the [SEA]." §556(a) of Chapter 1 (20 U.S.C. §3805(a)). The SEA's responsibility for approving LEA applications is also referred to in §555(c) of Chapter 1 (20 U.S.C. §3804(c)) which governs program descriptions and provides that an LEA may use Chapter 1 funds only for programs and projects "which are designed to meet the special educational needs of educationally deprived children . . . and which are included in an application for assistance approved by the [SEA]" (emphasis added).

The Chapter 1 regulations indicate that an LEA's application must include:

- a description of the Chapter 1 project to be conducted;
- the assurances required under §556(b) of Chapter 1; and
- the assurances required by §436(b)(2) and (b)(3) of GEPA.

§200.13(b), 47 FR 52345 (November 19, 1982).

Under §556(b) of Chapter 1, the LEA must assure the SEA that:

- the LEA "will keep such records and provide such information to the [SEA] as may be required for fiscal audit and program evaluation (consistent with the responsibilities of the [SEA] under [Chapter 1])."

- the Chapter 1 programs and projects described in the application "are conducted in attendance areas of such agency having the highest concentrations of low-income children; or . . . are located in all attendance areas of an agency which has a uniformly high concentration of such children."
- the Chapter 1 programs and projects described in the application "are based upon an annual assessment or educational needs which identifies educationally deprived children in all eligible attendance areas, requires, among the educationally deprived children selected, the inclusion of those children who have the greatest need for special assistance, and and determines the needs of participating children with sufficient specificity to ensure concentration on those needs."
- the Chapter 1 programs and projects described in the application "are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the children being served and are designed and implemented in consultation with parents and teachers of such children."
- the Chapter 1 programs and projects described in the application "will be evaluated in terms of their effectiveness in achieving the goals set for them, and that such evaluations shall include objective measurements of educational achievement in basic skills and a determination of whether improved performance is sustained over a period of more than one year, and that the results of such evaluation will be considered by such agency in the improvement of the programs and projects assisted under this chapter"; and

- the Chapter 1 programs and projects described in the application "make provision for services to educationally deprived children attending private elementary and secondary schools in accordance with section 557" of Chapter 1.

§556(b) of Chapter 1 (20 U.S.C. §3805(b)).

In addition, under the applicable GEPA provisions, the LEA must assure the SEA that:

- the "control of funds provided to the [LEA] under . . . [Chapter 1] . . . and title to property acquired with those funds will be in a public agency" and "a public agency will administer those funds and property;" and
- the LEA "will use fiscal control and fund accounting procedures that will ensure proper disbursement of, and accounting for, Federal funds paid to that agency under . . . [Chapter 1]."

§436(b)(2) and (b)(3) of GEPA (20 U.S.C. §1232e(b)(2) and (b)(3)).[41]

The standards for SEA approval of an LEA application are set forth in the statute and regulations. The statute provides that an LEA application "shall be approved if it provides assurances satisfactory to the [SEA] . . . ." §556(b) of Chapter

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[41] The application assurances required by §436(b)(1) and (b)(4)-(9) of GEPA do not apply to Chapter 1. §596(c) of ECIA (20 U.S.C. §3876(c)).

1 (20 U.S.C. §3805(b)).[42] The "Standards for approval" subsection of the regulation does not mention the required GEPA assurances[43], but merely states:

> An SEA shall approve an LEA's application for funds, if that application meets the requirements in Section 556 of Chapter 1.

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[42] After proposed Chapter 1 regulations were published for public comment, several commenters recommended that the proposed regulation on LEA applications be revised to require the inclusion of various types of additional information in LEA applications. The recommendations were rejected. As ED explained:

> In the interest of preserving maximum flexibility for SEAs and LEAs, the Secretary has decided not to specify information to be included in an LEA application beyond that which is required by Section 556 of Chapter 1. An SEA may decide what specific information it needs to determine that an LEA's assurances are satisfactory.

47 FR 52356 (November 19, 1982). ED also said that, "[e]ach SEA, in accordance with its rulemaking authority in §200.59, may determine what, if any, additional information it needs to approve LEA applications." (Id.)

[43] The December 1986 NRG, at 3, indicates that the GEPA assurances need to be on file with the SEA and that the SEA may have LEAs file these assurances one time and keep them on file indefinitely.

§200.14(a), 47 FR 52345 (November 19, 1982).[44] SEA approval of an application "does not relieve the LEA of its responsibility to comply with all applicable requirements." §200.14(b), 47 FR 52345 (November 19, 1982).

The same standards apply to annual updates of the LEA application. §200.14, 47 FR 52356 (November 19, 1982). According to the regulations, an LEA must update its application annually by submitting (1)"[d]ata showing that the LEA has maintained its fiscal effort as required by Section 558(a) of Chapter 1" and (2) a "budget for the expenditure of Chapter 1 funds." §200.13(c),

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[44] The Title I standards for SEA approval of LEA applications put considerably less emphasis on assurances and specifically linked application approval to other SEA Title I administrative areas, e.g., audits, monitoring, complaint resolution, evaluation, and enforcement. After the Education Amendments of 1978, an SEA was required first to consider four factors and then to make three determinations before approving an LEA application.

The four factors to be considered, where pertinent, were: (1) the results of federal and State audits of the LEA; (2) the results of federal and State monitoring reports; (3) complaints made by parents or others about the LEA's compliance with Title I requirements; and (4) LEA Title I evaluations.

The three determinations, which were supposed to follow consideration of the pertinent factors, were: (1) the LEA would use the Title I funds in compliance with the Title I statute and regulations, as well as GEPA and EDGAR, and State Title I rules and regulations; (2) the LEA would use the Title I funds in accordance with its approved application; and (3) the LEA was not out of compliance with either a determination that the LEA had to repay misspent Title I funds or a compliance agreement entered into in lieu of withholding of payments. §164 of Title I (20 U.S.C. §2811); 34 CFR §200.110, 46 FR 5148-5149, January 19, 1981).

47 FR 52345 (November 19, 1982). Furthermore, an LEA must update information in the application when there are "substantial changes in the number or needs of the children to be served or the services to be provided." §200.13(d), 47 FR 52345 (November 19, 1982). In such cases, an "LEA shall submit a description of those changes to the SEA." Id.

The June 1983 NRG comments further on SEAs' discretion with regard to the content of LEA applications. The NRG states, in part, at 4:

> In connection with its role in approving an LEA's application, the SEA may require the LEA to provide information that the SEA needs in order to carry out its responsibilities under Section 556 of Chapter 1. . . . Each SEA has the discretion to prescribe the format for LEA applications, and to determine what specific information LEAs must present as part of their applications. The SEA, however, may not use the application process to impose requirements that are inconsistent with the requirements under Chapter 1 or other applicable Federal statutes and regulations.[45]

Neither the 1983 NRG nor the 1986 NRG, however, provide examples of SEA requirements for LEA applications that would be "inconsistent with the requirements under Chapter 1."[46]

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[45] The December 1986 NRG, at 3, contains a similar statement about SEA discretion concerning the content of LEA applications. It also contains a statement not present in the June 1983 NRG: "The contents of the application must be sufficient to enable the SEA to determine that Chapter 1 requirements are being met." NRG at 3 (December 1986).

The Technical Amendments, which inserted some previously superseded Title I provisions into Chapter 1, contain certain LEA application-related matters which expressly require SEA approval. These include the requirements for SEA approval of:

- the "ranking by educational deprivation" school targeting and selection option. §556(d)(2) of Chapter 1 (20 U.S.C. §3805(d)(2));
- the "skipping schools receiving comparable services" targeting and selection option. §556(d)(5) of Chapter 1 (20 U.S.C. §3805(d)(2)); and
- the "school wide projects" option. §556(d)(9) of Chapter 1 (20 U.S.C. §3805(d)(9)) See §133(b) of Title I (20 U.S.C. §2752(b)).

The informal legal framework includes two documents which refer to application approval. The portion of the ED Program

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[46] Under §425 of GEPA (20 U.S.C. 1223lb-2) an LEA has certain due process and appeal rights if an SEA disapproves or fails to approve its application or program in whole or in part. ED initially said §425 of GEPA did not apply to Chapter 1. 47 FR 32858 (July 29, 1982).

After Congress disapproved the July 29, 1982 regulations, ED still maintained that §425 of GEPA did not apply to Chapter 1. ED said, in part, "[s]ection 425 only applies to programs in which assistance is provided in 'accordance with a State plan approved by the Secretary.' Chapter 1 is not such a program." 47 FR 52342 (November 19, 1982). ED did not mention that §425 of GEPA expressly applied, by its own terms, to "the program provided for in Title I of the Elementary and Secondary Education Act of 1965." Nevertheless, the June 1983 NRG asserted, at 42, that §425 of GEPA did not apply to Chapter 1.

There is no doubt, after the 1983 Technical Amendments, that §425 of GEPA applies to Chapter 1. §596 of ECIA (20 U.S.C. §3876); 50 FR 18408 (April 30, 1985), 51 FR 18407 (May 19, 1986).

Review Guide concerning applications contains the following notations for federal monitors under the headings of "what to review" and "possible problems":

What to Review	Possible Problems
State applications and instructions for LEAs and and State agencies.	SEA may not require all the information it needs to approve the project; variances from regulations and NRG.
Other State and local communications on applications.	Inaccurate or misleading communications; lack of State leadership to help LEAs understand the requirements.
SEAs' review process and contacts with the LEAs.	All applications approved as submitted; no evidence that LEAs are ever required to revise applications.

ED Program Review Guide at 5 (August 1985).

To assist State and local auditors who are auditing the use of federal funds by State and local governments, OMB has published a document entitled "Compliance Supplement for Single Audits of State and Local Governments." (Revised April 1985)(the OMB Compliance Supplement).[47] The Chapter 1 portion of this document describes, under various topic headings, compliance requirements and suggested audit procedures. The part that concerns Chapter 1 applications states:

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[47] The April 1985 OMB Compliance Supplement does not reflect changes made by the 1983 Technical Amendments.

Compliance Requirements

An SEA may grant Chapter 1 funds only to LEAs that submit an application for a project to be conducted during a period of not more than three fiscal years. An SEA shall approve an LEA's application for Chapter 1 funds if it includes a description of the Chapter 1 project to be conducted, the assurances required under Section 556(b) of Chapter 1, and the assurances required by Section 436(b)(2) and (b)(3) of GEPA. (Public Law 97-35, sec. 556) (34 CFR 200.13-200.14)

Suggested Audit Procedures

- Review the SEA's system for reviewing LEA applications and awarding funds to LEAs and evaluate for adequacy.
- Select a sample of accepted and rejected applications and determine if there is adherance to the prescribed procedures.

Compliance Requirement

An LEA may use Chapter 1 funds only to meet the costs of project activities that are designed and implemented to meet the special educational needs of educationally deprived children identified under section 556(b)(2) of Chapter 1, are included in an application approved by an SEA, and comply with all applicable Chapter 1 requirements. (Public Law 97-35, sec. 555(c)) (34 CFR 200.52)

Suggested Audit Procedures

- Review the LEA's approved project application.
- Review expenditure records and supporting documentation.

OMB Compliance Supplement (1985) at 2.

Except for a minor inconsistency, the legal framework for SEA approval of LEA applications appears to be generally internally consistent. The minor inconsistency concerns the Chapter 1 regulation which says an SEA must approve an LEA's application if it meets the requirements of §556 of Chapter 1. Certain required GEPA assurances, however, are not in §556 of Chapter 1.

SEA MONITORING

Chapter 1 relies more heavily on assurances from LEAs than did Title I. The Chapter 1 statute, however, does not contain a provision expressly requiring SEAs to monitor LEAs with Chapter 1 programs.[48] This is a significant change from the status accorded SEA monitoring under Title I. The Title I statute contained standards for SEA monitoring[49] and for an SEA monitoring and enforcement plan.[50]

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[48] §435(b)(3)(A) and (E) of GEPA (20 U.S.C. §1232d(b)(3)(A) and (E)) require that State applications assure the Secretary:

> that the State will adopt and use proper methods of administering each applicable program, including --
> (A) monitoring of agencies, institutions, and organizations responsible for carrying out each program, and the enforcement of any obligations imposed on those agencies, institutions, and organizations under law,
>
> * * *
>
> (E) the correction of deficiencies in program operations that are identified through monitoring . . .

These GEPA provisions do not apply to Chapter 1. §596(c) of ECIA (20 U.S.C. §3876(c)).

The 1983 Technical Amendments clarify the circumstances under which an LEA can exclude funds for certain special state and local programs from compliance with the supplement, not supplant and comparability requirements. (See §558(d) of Chapter 1; 20 U.S.C. §3807(d)). The amendment cross-references the standards for such exclusions set forth in §131(c) of Title I (20 U.S.C. §2751(c)). One of the §131(c) standards incorporated by reference is that "the [SEA] monitors performance under the program to assure that the requirements" pertaining to the exclusion are met (emphasis added).

Chapter 1 does provide implied authority for SEA monitoring. LEAs that wish to receive Chapter 1 funds for LEA projects must give the SEA written assurances that:

- "the [LEA] will use fiscal control and fund accounting procedures that will ensure proper disbursement of, and accounting for, Federal funds paid to that agency under . . . [Chapter 1]," and

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[49] Title I required that a State adopt monitoring standards, consistent with minimum standards established by the [Secretary], which:

> (1) describe the purpose and scope of monitoring;
> (2) specify the frequency of on-site visits;
> (3) describe the procedures for issuing and responding to monitoring reports, including but not limited to, the period of time in which the SEA must issue its reports, the period of time in which the applicant agency must respond and the appropriate follow-up by the SEA;
> (4) specify the methods for making monitoring reports available to parents, state and local auditors and other persons; and
> (5) specify the methods for ensuring that noncompliance practices are corrected.

§167 of Title I (20 U.S.C. §2814). The Title I regulations established minimum standards for each of the above areas. §200.151, 46 FR 5149-5150 (January 19, 1981.)

[50] Title I required that SEAs submit a State monitoring and enforcement plan at least once every three years. §171 of Title I (20 U.S.C. §2821); §200.21, 46 FR 5142 (January 19, 1981).

Under §434(a) of GEPA (20 U.S.C. §1232c(a)) the Secretary "may require" a State to submit a monitoring and enforcement plan which provides, in part, "for periodic visits by State personnel of programs administered by local agencies to determine whether such programs are being conducted in accordance with such requirements." This GEPA provision does not apply to Chapter 1. §596(c) of ECIA (20 U.S.C. §3876(c)).

- "the control of funds provided to the [LEA] under each program and title to property acquired with program funds will be in a public agency and that the public agency will administer such funds and property."

§596(c) of ECIA (20 U.S.C. §3876(c); §436(b)(3) and (b)(2) of GEPA (20 U.S.C. §1232(d)).

Also, the Chapter 1 regulations describe the general responsibilities of an SEA as follows:

> An SEA is responsible for ensuring that the agencies that receive Chapter 1 funds in the State comply with all statutory and regulatory provisions applicable to Chapter 1.

§204.13(a), 51 FR 18412 (May 19, 1986). (§204.13(a) was previously numbered as §200.59, 47 FR 52349 (November 19, 1982).)[51] Although these provisions do not expressly require monitoring, they do provide implied authority for monitoring.

ED permits States broad discretion in the area of monitoring. As ED said in response to a comment on the proposed Chapter 1 regulations:

> The statute does not require the Secretary to issue regulations relating to monitoring by the SEA, and

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[51] For purposes of judicial review of determinations to withhold payment of Chapter 1 funds for enforcement purposes, the statute creates a presumption of compliance for SEAs and LEAs. §593(b) of ECIA (20 U.S.C. §3873(b)). The legislative history emphasizes that this presumption of compliance "is in no way intended to relieve or change the responsibilities of the SEAs to ensure compliance by LEAs with the provisions of Chapter 1." S. Rep. No. 98-166, 98th Cong. 1st Sess. (1983) at 13.

> the Secretary believes that this matter is best left to State determination.

47 FR 52356 (November 19, 1982).

Consistent with this approach, neither the June 1983 NRG nor the December 1986 NRG provide guidance on how SEAs may exercise their implied authority to monitor LEA Chapter 1 programs and projects.

The informal legal framework provides some sense of Federal expectations concerning SEA monitoring. The ED Program Review Guide, at 5, instructs Federal monitors on "what to review" and "possible problems" when they examine SEA monitoring:

What to Review	Possible Problems
SEA monitoring procedures, guides and records; schedule for current year.	Few visits to LEAs scheduled or completed; few reports to LEAs of SEA's monitoring visits; no evidence that SEA requires corrective action.

The SEA portion of the 1986 ED monitoring guide, at xvi, advises federal auditors to:

> Describe the SEA's monitoring procedures in terms of the following:
>
> (A) schedules, actual numbers of sites visited during 85-86 school year
> (B) use of monitoring instruments
> (C) reports and responses
> (D) enforcement of corrective actions.

The 1985 ED Program Review Guide and the 1986 ED monitoring guide reveal federal expectations that are not addressed by the statute, regulations, or NRG. The part of the 1985 Program

Review Guide concerning State monitoring describes as "possible problems" such matters as "few reports to LEAs of SEA's monitoring visits" and "no evidence that SEA requires corrective action." The part of the 1986 ED monitoring guide concerning SEA monitoring procedures refers to monitoring schedules, monitoring instruments, and reports and responses. SEAs may understand that they are expected to have monitoring schedules, to use monitoring instruments, to issue reports to LEAs after monitoring visits and to require any necessary corrective action after monitoring, but these expectations do not arise from any standards for SEA monitoring in the statute, regulations or NRG.

STATE AUDITS

The Chapter 1 statute does not contain a separate provision expressly requiring State audits.[52] The early Chapter 1 regulations state, in part:

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[52] ED has explained that "[a]uthority to require audits is derived from several sources; Sections 555(d) and 556(b) of the ECIA; Section 452 of GEPA, Section 1744 of the Omnibus Budget Reconciliation Act of 1981; Sections 3, 4, and 6 of the Inspector General Act of 1978; and Section 202 of the Intergovernmental Cooperation Act of 1968." 47 FR 52360 (November 19, 1982).

Under §434(a)(2) of GEPA (20 U.S.C. §1232c(a)(2)), the Secretary "may require a State to submit a monitoring and enforcement plan which provides, in part, "for periodic audits of expenditures . . . . by auditors of the State or other auditors not under the control, direction, or supervision of the [LEA]." According to §596(c) of ECIA (20 U.S.C. §3876(c)), §434 of GEPA does not apply to Chapter 1 except to the extent that the section "relate[s] to fiscal control and fund accounting procedures . . . ." The Secretary "has indicated that the provision in section 434 [of GEPA] that applies to Chapter 1 is subsection (a)(2) pertaining to the Secretary's discretionary authority to request a plan on audits." 51 FR 18407 (May 19, 1986).

> Any state or local government that receives Chapter 1 funds shall comply with the audit requirements in 34 CFR §74.62.

§200.57(b), 47 FR 52348 (November 19, 1982). The EDGAR regulations, in 34 CFR §74.62, implement the State and local government audit requirements contained in Attachment P to OMB Circular A-102. These requirements concern organizationwide audits rather than audits of single grants like Chapter 1.[53] OMB has also issued a compliance supplement to Attachment P. This supplement contains information on the major compliance requirements of

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[53] The legislative history of the Single Audit Act traced the recent history of OMB Circular A-102. Referring to a previous committee report, the legislative history said:

> The report noted that the Office of Management and Budget had revised its Circulars A-102 and A-110 in the mid-1970s to require grant recipients to obtain organizationwide financial and compliance audits, but concluded that additional OMB guidance and a stronger OMB management role were necessary to improve Federal grant auditing procedures . . . .
>
> Issued by OMB in October 1979 in response to these reports, Attachment P to Circular A-102 requires each State and local government receiving Federal financial assistance to obtain an organization-wide financial and compliance audit of its operations at least once every two years. Such audits must be conducted in accordance with GAO's "Standards for Audit of Governmental Organizations, Programs, Activities, and Functions;" "Guidelines for Financial and Compliance Audits of Federally Assisted Programs," . . . generally accepted auditing standards issued by the American Institute of Certified Public Accountants (AICPA); and any compliance supplements approved by OMB.

H. Rep. No. 98-708, 98th Cong. 2d Sess. (1984) at 4-5 (footnotes

[continued on next page]

Chapter 1 for review as part of organization-wide audits.[54]

The June 1983 NRG, at 18, discusses State audit responsibilities as follows:

> Section 200.57(b) of the regulations provides that any State or local government that receives Chapter 1 funds must comply with the audit requirements in 34 CFR 74.62. Section 74.62 provides for independent audits of financial operations, including compliance with certain provisions of Federal laws and regulations. The requirments are established to ensure that audits are made on an organizationwide basis, rather than on a grant-by-grant basis. As recipients of Federal financial assistance, SEAs are responsible for ensuring that the single, organizationwide audits of

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53 [continued from previous page] omitted). On July 20, 1982, ED published in the Federal Register final rules amending EDGAR to incorporate the 1979 Attachment P requirements for audits on an organizationwide basis, rather than a grant-by-grant basis.

[54] As the legislative history of the Single Audit Act states:

> To assist auditors in testing Federal programs for compliance with applicable requirements, OMB, in August 1980, issued a supplement to Attachment P listing the major compliance requirements of 60 Federal grant programs, representing approximately 90 percent of total Federal aid to State and local governments. The supplement was revised in December 1982 to reflect changes in program requirements, and is currently being revised again to add the compliance requirements of recently enacted programs.

H. Rep. No. 98-708, 98th Cong. 2d Sess. (1984) at 5.

subrecipients required by §74.62 are conducted.[55]

The Attachment P audit requirements were reflected in the Single Audit Act of 1984 which contains audit requirements for State and local governments that receive Federal financial assistance. In April 1985, however, OMB issued OMB Circular A-128 (Uniform Audit Requirements for State and Local Governments) which superseded the Attachment P audit requirements of OMB Circular A-102. 50 FR 30253 (August 8, 1985).[56] ED, which was revising a portion of the Chapter 1 regulations when OMB Circular A-128 was issued, decided to promulgate separate regulations for the Single Audit Act. Consequently, when revised portions of the

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[55] The Title I statute contained specific requirements for audits to determine, at a minimum, the fiscal integrity of financial transactions and reports and compliance with applicable legal requirements. §170(a) of Title I (20 U.S.C. §2817(a)). Title I also required that SEAs have written audit resolution procedures which met minimum standards established by the Commissioner. §170(b) of Title I (20 U.S.C. §2817(b)). Misspent or misapplied Title I funds had to be repaid when the audit resolution process determined this. §170(c) of Title (20 U.S.C. §2817(c)). LEAs could appeal final SEA audit determinations to the Commissioner and the Commissioner was authorized to take collection action when there finally a failure to repay misspent or misapplied Title I funds. §170(d) and (e) of Title I (20 U.S.C. §2817(d) and (e)); §§200.190-200.196, 46 FR 5153-5154 (January 19, 1981).

[56] A draft of OMB Circular A-128 was published in the Federal Register. 49 FR 50134 (December 26, 1984).

Chapter 1 regulations were issued in 1985,[57] they did not incorporate the requirements of the Single Audit Act.

The subsequent Single Audit Act regulations state the following with respect to the obligation to audit:

> a. State or local governments that receive $100,000 or more a year in Federal financial assistance shall have an audit made in accordance with this appendix [to the regulations].
> b. State or local governments that receive between $25,000 and $100,000 a year shall have an audit made in accordance with this appendix [to the regulations] or in accordance with Federal laws and regulations governing the programs they participate in.
> c. State or local governments that receive less than $25,000 a year shall be exempt from compliance with the Act and other Federal audit requirements. These State and local governments shall be governed by audit requirements prescribed by State or local law or regulation.

§74.62, Appendix G, para. 2 a-c, 50 FR 37358 (September 13, 1985).

ED requires compliance with the Single Audit Act for any State or local government's fiscal years that begin after December 31, 1984. §204.11(b)(1), 51 FR 18412 (May 9, 1986)

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[57] With respect to state and local audit responsibilities, the revised Chapter 1 regulations say:

> Any state or local government that receives Chapter 1 funds shall comply with the audit requirements in 34 CFR 74.62 which implements the Office of Management and Budget Circular A-102, Attachment P.

§204.11, 50 FR 18416 (April 30, 1985).

The required frequency of audits is specified in the regulations:

> Audits shall be made annually unless the State or local government has, by January 1, 1987, a constitutional or statutory requirement for less frequent audits. For those governments, the cognizant [Federal] agency shall permit biennial audits, covering both years, if the government so requests. It shall also honor requests for biennial audits by governments that have an administrative policy calling for audits less frequent than annual, but only for fiscal years beginning before January 1, 1987.

§74.62, Appendix G, para. 5, 50 FR 37359 (September 13, 1985).

The regulations also provide that:

- The audit be made by "an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits."
- The audit cover "the entire operations of a State or local government or, at the option of that government, it may cover departments, agencies or establishments that received, expended, or otherwise administered Federal financial assistance during the year. However, if a State or local government receives $25,000 or more in General Revenue Sharing Funds in a fiscal year, it shall have an audit of its entire operations. A series of audits of individual departments, agencies, and establishments for the same fiscal year may be considered a single audit."

§74.62, Appendix G, para. 4a and 4b, 50 FR 37358 (September 13, 1985).

The independent auditor must examine financial statements, fiscal controls, and compliance. The auditor must determine whether:

> (1) The financial statements of the government, department, agency or establishment present fairly its financial position and the results of its financial operations in accordance with generally accepted accounting principles;

> (2) The organization has internal accounting and other control systems to provide reasonable assurance that it is managing Federal financial assistance programs in compliance with applicable law and regulations; and
>
> (3) The organization has complied with law and regulations that may have material effect on its financial statements and on each major Federal assistance program.[58]

§74.62, Appendix G, para. 4d(1) (3), 50 FR 37358 (September 13, 1985). The regulations contain detailed requirements about how the auditor is to make these determinations §74.62, Appendix G,

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[58] An attachment to Appendix G defines a "Major Federal Assistance Program" as follows:

> Major Federal Assistance Program," for State and local governments having Federal assistance expenditures between $100,000 and $100,000,000, means any program for which Federal expenditures during the applicable year exceed the larger of $300,000, or 3 percent of such total expenditures.
>
> Where total expenditures of Federal assistance exceed $100,000,000, the following criteria apply:

Total expenditures of Federal financial assistance for all programs		Major Federal assistance program means any program exceeds
More than	But less than	
$100 million . .	$1 billion	$3 million
$1 billion . . .	$2 billion	$4 million
$2 billion . . .	$3 billion	$7 million
$3 billion . . .	$4 billion	$10 million
$4 billion . . .	$5 billion	$13 million
$5 billion . . .	$6 billion	$16 million
$6 billion . . .	$7 billion	$19 million
Over $7 billion.	. . . .	$20 million

50 FR 37361 (September 13, 1985).

para. 6, 50 FR 37359 (September 13, 1985).[59]

LEAs are considered "subrecipients" under the Single Audit Act. State governments that provide $25,000 or more in Federal financial assistance to an LEA in a fiscal year must:

- determine whether the LEA has met the audit requirements in the regulations;
- determine whether the LEA spent Federal funds in accordance with applicable laws and regulations;[60]
- ensure that appropriate corrective action is taken within six months after receipt of the audit report in instances of noncompliance with Federal laws and regulations;
- consider whether LEA audits necessitate adjustment of the LEA's own records; and
- require each LEA to permit independent auditors to have access to records and financial statements as necessary to comply with audit regulations.

§74.62, Appendix G, para. 7a-e, 50 FR 37359 (September 13, 1985).

The regulations require that audit reports be prepared at the completion of the audit. Among the matters which must be included in the audit report are the auditor's compliance findings. The auditor's report on compliance must contain:

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[59] The regulations indicate that the "principal compliance requirements of the largest Federal aid programs may be ascertained by referring to the Compliance Supplement for Single Audits of State and Local Governments, issued by OMB and available from the Government Printing Office." §74.62, Appendix G, para. 6(c), 50 FR 37359 (September 13, 1985).

[60] This may be accomplished by reviewing an audit of the LEA made in accordance with the regulations "or through other means (e.g., program reviews)" if the LEA has not yet had such an audit. §74.62, Appendix G, para. 7b., 50 FR 37359 (September 13, 1985).

- "A statement of positive assurance with respect to those items tested for compliance, including compliance with law and regulations pertaining to financial reports and claims for advances and reimbursements;"
- "Negative assurance on those items not tested;"
- "A summary of all instances of noncompliance;" and
- "An identification of total amounts questioned, if any, for each Federal assistance award, as a result of noncompliance."

§74.62, Appendix G, para. 11a.(3), 50 FR 37359 (September 13, 1985).

The auditor must submit the audit report(s) to the organization audited, and to those requiring or arranging for the audit. §74.62, Appendix G, para. 11f., 50 FR 37360 (September 13, 1985). LEAs must submit copies to SEAs. Id.

The 1986 Chapter 1 regulations implementing the Technical Amendments state:

> Any State or local government that receives Chapter 1 funds shall comply with the audit requirements in the Single Audit Act of 1984 and the regulations in 34 CFR 74.62 with respect to any of the government's fiscal years that begin after December 31, 1984.

§204.11(b)(1), 51 FR 18412 (May 19, 1986).[61]

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[61] The December 1986 NRG does not discuss audits. ED has indicated that audits and other topics will be discussed in a separate NRG for Part 204 of the Chapter 1 regulations.

The Chapter 1 regulations governing State and local audits require that an LEA "repay to the SEA the amount of Chapter 1 funds determined by the State not to have been spent in accordance with applicable law." §204.11(b)(2)(i), 50 FR 18417 (April 30, 1985).[62] If the SEA recovers the misspent funds from an LEA while they are still available for obligation under §412(b) of GEPA, the SEA must treat the recovered funds as Chapter 1 funds and must choose one of the following three options:

- reallocate the funds for proper use to eligible LEAs other than the LEA that misspent thee funds;
- return the funds to the LEA from which they were recovered; or

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[62] The Chapter 1 regulations do not discuss an LEA's due process and appeal rights under §425 of GEPA (20 U.S.C. 1231b-2). Under §425 of GEPA, an LEA has certain due process and appeal rights when an SEA orders "in accordance with a final State audit resolution determination, the repayment of misspent or misapplied Federal funds." ED initially said §425 of GEPA did not apply to Chapter 1. 47 FR 32858 (July 29, 1982).

After Congress disapproved the July 29, 1982 regulations, ED still maintained that §425 of GEPA did not apply to Chapter 1. ED said, in part, "[s]ection 425 only applies to programs in which assistance is provided 'in accordance with a State plan approved by the Secretary.' Chapter 1 is not such a program." 47 FR 52342 (November 19, 1982). ED did not mention that §425 of GEPA expressly applied, by its own terms, to "the program provided for in Title I of the Elementary and Secondary Education act of 1965." Nevertheless, the June 1983 NRG asserted, at 42, that §425 of GEPA did not apply to Chapter 1.

There is not doubt, after the 1983 Technical Amendments, that §425 of GEPA applies to Chapter 1. §596 of ECIA (20 U.S.C. §3876); 50 FR 18408 (April 30, 1985), 51 FR 18407 (May 19, 1986). ED's regulations implementing the Single Audit Act, however, do not discuss the applicability of § 425 of GEPA. 50 FR 37356-37361 (April 30, 1985).

- o return the funds to ED.

§204.11(b)(ii)(A)(1)-(3), 50 FR 18417 (April 30, 1985). If the recovered funds are no longer available for obligation under §412(b) of GEPA, the SEA must return the funds to ED. §204.11(b)(iii), 50 FR 18417 (April 30, 1985).

The informal legal framework addresses auditing in three documents. The 1985 ED Program Review Guide, at 4, advises Federal monitors about "what to review" and "possible problems" when examining how States carry out their audit responsibilities:

What to Review	Possible Problems
State auditing, nature scope, impact on LEAs; use of the OMB compliance supplement.	No regular schedules; very little State guidance; no implementation of A-102-P; no compliance auditing; audits not done at least every two years.
SEA's response to and implementation of Federal and State audit recommendations.	SEA not following through on audit recommendations.
SEA's procedures for resolving LEA and State agency A-102-P audits.	No established timelines; lack of documentation that procedural and monetary findings are resolved.

The SEA portion of the 1986 ED monitoring guide, at iv-v, tells federal monitors to:

- o Describe the SEA's policy for State audits; include the nature, scope and their impact on LEAs.
- o Describe the State's response to and implementation of recommendations made as a result of Federal and State audit findings.

- Describe the SEA's procedure for resolving LEA and State agency audits.

The Chapter 1 part of the OMB Compliance Supplement for Single Audits of State and Local Governments (1985) contains "compliance requirements" and "suggested audit procedures" under the following major headings:

- Types of services allowed or unallowed;
- Eligibility;
- Matching, level of effort, and/or earmarking requirements;
- Reporting requirements; and
- Special tests and provisions.

The relevant "compliance requirements" and "suggested audit procedures" are described in other sections of the paper, e.g., application approval, supplement not supplant, comparability, carryover of funds, etc.

The legal framework for State and local audits is generally consistent, except that the 1985 OMB Compliance Supplement does not reflect the 1983 Technical Amendments and the 1985 ED Program Review Guide refers to OMB Circular A-102's Attachment P rather than the Single Audit Act and OMB Circular A-128. These appear to be the result of delays in updating these documents rather than policy inconsistencies.

STATE ENFORCEMENT MECHANISMS

SEAs can use application approval, monitoring, and auditing to identify noncompliance and to enforce Chapter 1 requirements.

Chapter 1 does not contain a separate provision authorizing SEAs to suspend or withhold payments of Chapter 1 funds as an enforcement mechanism.[63] SEA authority to suspend or withhold Chapter 1 payments has been clouded by the dispute over the applicablity of GEPA to Chapter 1. Section 434(b)(2) and (b)(3) of GEPA (20 U.S.C. §1232c) authorize SEAs to suspend or withhold payments to "enforce the Federal requirements under any applicable program." Section 434(b)(2) of GEPA provides that an SEA may

> . . . suspend payments to any local agency, in whole or in part under the program if the State has reason to believe that the local agency has failed substantially to comply with any of such requirements, except that (A) the state shall not suspend such payments until 15 days after the state provides a local agency an opportunity to show cause why such action should not be taken and (B) no such suspension shall continue in effect longer than 60 days unless the state within such period provides the [required] notice for a hearing.

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[63] In the Education Amendments of 1978, Congress clarified the authority of SEAs to suspend and to withhold payments under Title I. The legislative history of the 1978 Amendments discussed the Congressional rationale for this clarification and stated that "NIE analyzed the authority of [SEAs] to enforce Title I requirements, and found that although the states had implied authority to withhold or suspend funds, the manner in which states implemented this authority was 'quite inconsistent.'" S. Rep. No. 95-856, 95th Cong. 2d Sess. (1978), at 61. In response to this finding, Title I contained express authority for SEAs to suspend and withhold Title I payments. §169 of Title I (20 U.S.C. §2816).

Section 434(b)(3) of GEPA indicates that an SEA may

> . . . withhold payments, in whole or in part, under any such program if the State finds, after reasonable notice and opportunity for hearing before an impartial hearing officer, that the local agency has failed substantially to comply with any of the requirements. Any withholding of payments . . . shall continue until the State is satisfied that there is no longer a failure to comply substantially with any of such requirements.

As originally enacted, §596(a) of ECIA indicates, in part, that §434 of GEPA does not apply to Chapter 1 (except to the extent it relates to "fiscal control and fund accounting procedures") and does not "authorize the Secretary . . . to take any actions not specifically authorized by" ECIA.

The preface to the early Chapter 1 regulations also indicates that §434 of GEPA does not apply to Chapter 1 except to the extent that it relates to fiscal control and fund accounting procedures. 47 FR 52342 (November 19, 1982). One commenter believed that the authority for SEAs to suspend or withhold funds related to "fiscal control" and that §434(b)(2) and (b)(3) of GEPA should apply to Chapter 1. ED disagreed.

> The Secretary interprets the terms "fiscal control" and "fund accounting" to refer only to activities that relate to the manner in which accountability is maintained for the expenditure of Chapter 1 funds. Withholding of funds by an SEA is essentially an enforcement activity not directly related to accountability for program funds.

The early Chapter 1 regulations do not contain any provision expressly authorizing SEAs to suspend or withhold Chapter 1 payments. The June 1983 NRG, at 42, indicates that §434(b)(2) and (b)(3) of GEPA do not apply to Chapter 1.

Congress disagreed. The legislative history of the 1983 Technical Amendments indicates that Congress considered SEA authority to suspend or withhold payments to be related to fiscal control and fund accounting procedures:

> As regards the applicability of Section 434 of GEPA to ECIA, the Committee particularly notes subsections 434(b) (2) and (3) of GEPA. These sections related to SEA suspension and withholding of payments to LEAs that have failed to comply with Federal program requirements. These sections therefore deal with fiscal control and fund accounting procedures and as such shall be considered applicable to ECIA.

H. Rep. No. 98-51, 98th Cong. 1st Sess. (1983) at 9. See S. Rep. No. 98-166, 98th Cong. 1st Sess. (1983) at 14.

In the 1983 Technical Amendments, §596(c) of ECIA (20 U.S.C. §3876(c)) provides, in part, that §434 of GEPA does not apply to Chapter 1 except to the extent it "relate[s] to fiscal control and fund accounting procedures." This is the same as what the original Chapter 1 statute said about applicability of §434 of GEPA to Chapter 1.

In April 1985, ED issued a revised portion of the Chapter 1 regulations, primarily concerning due process procedures. In discussing the applicability of GEPA, ED said that §434 of GEPA did not apply to Chapter 1 except to the extent it related to fiscal control and fund accounting procedures. 50 FR 18408

(April 30, 1985). ED did not mention SEA authority to suspend or withhold payments under §434(b)(2) and (b)(3) of GEPA.

The introduction preceding the 1986 Chapter 1 regulations (implementing the Technical Amendments) indicates ED gave the matter additional consideration. As the discussion preceding the regulations states:

> Upon further consideration in conjunction with the review of GEPA applicability in Pub. L. 98-211, the Secretary has determined that section 434(b) (2) and (3) relating to SEA suspension and withholding of payments to LEAs that have failed to comply with Federal program requirements also deals with fiscal control and fund accounting procedures and is therefore applicable to Chapter 1.

51 FR 18407 (May 10, 1986). The regulations, however, do not contain a section concerning SEA authority to suspend or withhold Chapter 1 payments under §434(b)(2) and (b)(3) of GEPA.

After the 1986 Chapter 1 regulations were published, a State wrote to ED and asked for comments on the State's policies for withholding Chapter 1 funds and for entering into a compliance agreement.[64] The State proposed to use a compliance agreement (which it called a "repayment agreement") when an LEA's violation was not serious enough to warrant withholding of funds or when the LEA only needed a short time to correct a violation. The State's proposed policies also relied on provisions in EDGAR concerning suspension of funding. ED advised that the policies were "allowable" and said:

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[64] Title I had authorized compliance agreements for SEAs to suspend the initiation or continuation of a withholding action. §169(c) of Title I (20 U.S.C. §2816(c)). Chapter 1 does not contain express statutory authority for compliance agreements. In fact, when a commenter on the 1982 regulations asked if the State rulemaking provision authorized SEAs to enter into compliance agreements with applicant agencies, ED said:

> There is no specific authority in Chapter 1 authorizing SEAs to enter into compliance agreements with LEAs.

47 FR 52361 (November 19, 1982).

> Under the repayment and withholding procedures, your agency notifies the [LEAs] of the withholding provisions in Section 434 of [GEPA], Sections 74.113 and 74.114 of [EDGAR] and section 204.11 of the Chapter 1 regulations. Repayment agreements may be implemented in lieu of withholding. The repayment agreement may be a remedy that is legally available and appropriate in certain circumstances in accordance with Section 74.113(a) of EDGAR. As you know, except for Section 74.62, EDGAR applies to Chapter 1 only if the State determines that it applies.

Program implementers may not have perceived ED as being completely consistent in two ED statements on SEA use of compliance agreements in lieu of withholding. Title I expressly authorized such compliance agreements. Chapter 1 does not expressly authorize them. When ED was asked in 1982 if the Chapter 1 regulation on State rulemaking authorized SEAs to enter into compliance agreements with applicant agencies, ED did not give a direct "yes" or "no" answer. Instead, ED carefully and accurately said there was "no specific authority in Chapter 1 authorizing SEAs to enter into compliance agreements with LEAs". 47 FR 52361 (November 19, 1982). When ED was asked by a State in 1986 if the SEA could use a "repayment agreement" (which was really a compliance agreement since it did not involve any repayment and was to be used in lieu of withholding), ED cautiously said that the State policy was "allowable"; that "[r]epayment agreements may be implemented in lieu of withholding"; and that the repayment agreement "may be a remedy that is legally available and appropriate in certain circumstances" in accordance with EDGAR (which, of course, applies to Chapter 1 only if a State determines it applies).

Given the precise language ED has used in those two situations, it is difficult to assert a direct inconsistency. When we cut through the caution to the essence, however, ED said in 1982 that Chapter 1 did not specifically authorize a compliance agreement and then essentially said in 1986 that a State policy for compliance agreements was "allowable". This was not a direct contradiction, but program implementers may not have perceived the two signals as being totally consistent.

STATE EVALUATION, RECORD KEEPING, AND REPORTING

ECIA includes two provisions pertaining to program evaluation by States. Section 555(e) of Chapter 1 (20 U.S.C. §3804(e)), added by the 1983 Technical Amendments, provides:

> Each State educational agency shall --
>
> (1) conduct an evaluation of the programs assisted under this chapter at least every two years and shall make public the results of that evaluation; and

> (2) collect data on the race, age, and gender of children served by the programs assisted under this chapter and on the number of children served by grade-level under the programs assisted under this chapter.[65]

Section 591(b) of ECIA (20 U.S.C. §3871(b)) precludes the Secretary from issuing regulations "relating to the details of . . . evaluating programs and projects by State and local educational agencies."[66]

The Chapter 1 regulations maintain that States, to meet their obligation to "conduct an evaluation," may aggregate evaluation data from local educational agency "objective measurements of educational achievement in basic skills," and report statewide totals. §204.23(a)(2), 51 F.R. 18413 (May 19, 1986).[67] The 1986 NRG, at 41, suggests, "To obtain uniform data, the SEA may wish to require that its LEAs use specific instruments to measure achievement or specific evaluation designs." The NRG then

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[65] The Senate committee recommended §555(e) "[r]ecognizing the need for clearer guidance to underscore the value of evaluation." S. Rep. No. 98-166, 98th Cong, 1st Sess (1983), at 8.

[66] Prior to Chapter 1, §172 of Title I and GEPA §435(b)(4) and (6) had required State evaluation reports as well as additional reports needed by federal officials to carry out their program oversight responsibilities.

[67] Responding to a comment that "aggregation of data does not constitute conducting an evaluation and, therefore, does not meet the statutory requirement," the Department said:

[continued on next page]

reprints the 1981 Title I regulations describing previously required evaluation models.

The Chapter 1 regulations, in §204.23(a)(ii), also require that data on Chapter 1 participants' race, age, gender, and

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67 [continued from previous page]

> The Secretary does not interpret the statutory requirement that SEAs "conduct an evaluation" to mean that SEAs must gather all original data. Rather, if they wish, SEAs may design systems that would allow them to aggregate local information, analyze it, and from this data, provide a state-wide evaluation of the Chapter 1 program. This approach would not only meet the statutory requirement but would provide highly useful data on a statewide basis of the success of the program, would allow for comparisons between State averages and local achievements, would provide information for comparisons among States, and may allow further aggregation of information from States choosing this option to give national results. [51 FR 18423]

ED's response addresses the question whether States must gather their own objective basic skills achievement data, or may simply aggregate LEA achievement data; but it does not address the more fundamental question raised by the comment: When Congress says "conduct an evaluation," does Congress mean merely "gather objective basic skills achievement data"? If guidance on this question were to be drawn from GEPA §417, the congressional requirement for federal evaluation of federal education programs, the answer might be no. In that law Congress deemed evaluation to include qualitative as well as quantitative assessment of program effectiveness, including progress made in achieving qualitative goals related to program purposes. GEPA §417 also deems recommendations for improvement and plans for corrective action to be integral to evaluation. See pages 39-40 of this paper. Nevertheless, one might draw a contrary inference from GEPA §417--that Congress's failure to put in §555(e) of Chapter 1 language similar to that in GEPA §417 means Congress does not want State Chapter 1 evaluations to be as comprehensive in scope as evaluations for other education programs. There is no direct evidence in Chapter 1 legislative history supporting this inference, however; one would have to draw support from the general congressional intent that ECIA be less prescriptive. But see note 65, above.

number-by-grade-level be collected annually.[68]

Section 596(c) of ECIA (20 U.S.C. §3876(c)) excludes the Chapter 1 program from coverage under most of GEPA §435 (20 U.S.C. §1232d); thus, the State evaluation requirements of §435(b)(3), (4), and (6) do not apply to Chapter 1.[69]

The SEA portion of the 1986 ED monitoring guide, at ix-x, instructs federal monitors as follows:

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[68] Responding to a suggestion that this data be collected every two years, the Department said, "Chapter 1 requires SEAs to collect data on 'children served by the programs assessed under [Chapter 1] . . ..' To allow biennial data collection would eliminate counts of children served in the alternate years." 51 FR 18422 (May 19, 1986).

[69] §435(b)(3), (4) and (6) of GEPA (20 U.S.C. §1232d) requires, in part, that a State application assure the Secretary:

> (3) that the State will adopt and use proper methods of administering each applicable program, including --
>
> * * *
>
> (E) the correction of deficiencies in program operations that are identified through . . . evaluation;
>
> (4) that the State will evaluate the effectiveness of covered programs in meeting their statutory objectives, at such intervals (not less often than once every three years) and in accordance with such procedures as the [Secretary] may prescribe by regulation, and that the State will cooperate in carrying out any evaluation of each program conducted by or for the Secretary or other Federal official;
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> * * *
>
> (6) that the State will make reports to the [Secretary] (including reports on the results of evaluations required under paragraph (4)) as may reasonably be necessary to enable the [Secretary] to perform his duties under each program, and that the State will maintain such records, in accordance with the requirements of section 437 of this Act, and afford access to the records as the [Secretary] may find necessary to carry out his duties.

- Describe the procedures the SEA has developed to determine that Chapter 1 projects will be evaluated in terms of their effectiveness in achieving the goals set for them.
- Describe the procedure the SEA has developed to ensure that the evaluations include objective measurements of educational achievement in basic skills.
- Describe the procedure the SEA has developed to ensure that the results of the evaluations are considered by LEAs in program improvement.
- Describe the procedure the SEA has developed to ensure that LEAs determine whether improved performance is sustained over a period of more than one year (sustained effects studies).
- What procedures have the SEA developed to evaluate the Chapter 1 program every two years.

GEPA §406A(a) (20 U.S.C. §1221e-1a(a)), a reporting obligation, is applicable to the Chapter 1 program. For each federal education program they administer, States must submit an annual public report indicating the funds made available to them from each applicable federal appropriation act, and listing all grants and contracts made.

The record keeping obligations of State officials are found in three provisions, one in Chapter 1 and two in GEPA. Section 555(d) of Chapter 1 (20 U.S.C. §3804(d)) requires each SEA to "keep such records and provide such information to the Secretary as may be required for fiscal audit and program evaluation." GEPA §437(a) (20 U.S.C. §1232F(a)) requires states to:

> keep records which fully disclose the amount and disposition . . . of those funds, total cost of the activity for which the funds are used, the share of that cost provided from other sources, and such other records as will facilitate an effective audit.

The Chapter 1 regulations repeat these requirements, and, in addition, require keeping of records needed to "show compliance with Chapter 1 requirements." §204.10(b)(1) and (2).

Under §596(c) of ECIA (20 U.S.C. §3876(c)), the portions of GEPA §435 which "relate to fiscal control and fund accounting procedures" apply to State administration of Chapter 1. Section 435(b)(5) of GEPA (20 U.S.C. §1232d(b)(5)) requires each State, in submitting its application for Chapter 1 funds, to assure "that the State will use fiscal control and fund accounting procedures that will ensure proper disbursement of, and accounting for, Federal funds paid to the State." The Chapter 1 regulations repeat this requirement. §204.10(a), 50 F.R. 18416 (April 30, 1985).70

Under GEPA §437(a) and §204.10(c)(1) of the Chapter 1 regulations, all required records must be retained for five years after the completion of the activity to which they pertain. The

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70 Section 204.10 of the regulations is, with nonsubstantive exceptions, identical to §200.56 of the November 19, 1982 Chapter 1 regulations. The previous Title I regulations had been similar in content, with an additional requirement to retain "[r]ecords of significant project experiences and results." §200.140(b)(4), 46 FR 5150 (January 19, 1981). The June 1983 Nonregulatory Guidance stated, at 17, "Consistent with the intent of Congress to reduce regulatory burdens, the recordkeeping requirements in §200.56 represent a major reduction from the recordkeeping that was previously required by §200.140 of the Title I regulations." The 1986 NRG does not contain a section devoted to recordkeeping, though some sections suggest appropriate records relevant to specific Chapter 1 requirements.

Chapter 1 regulations, however, add that records must be kept "[u]ntil all pending audits or reviews concerning the Chapter 1 project have been completed . . . and . . . all findings and recommendations arising out of any audits concerning the Chapter 1 project have been finally resolved." §204.10(c)(2) and (3).

The regulations also provide for ED "access to any records and personnel that may be related or pertinent" when ED personnel conduct evaluations or program reviews, and for "access to information and . . . to agency personnel for . . explanations of the information" when the ED Inspector General conducts audits. §204.11(a)(1)(i) and (ii).

In sum, the legal framework for state evaluation is internally consistent, with one possible exception. The Chapter 1 regulations say States may meet their statutory evaluation obligation merely by collecting test score data. In GEPA and Title I, however, Congress indicated that evaluation requires qualitative assessment of administrative and educational practices, and recommendation of any needed improvements, not just collection of statistics. There is no clear indication Congress desires less for Chapter 1, and ED's regulation therefore may be inconsistent with the statute.

LOCAL IMPLEMENTATION

THE SUPPLEMENT, NOT SUPPLANT PROVISION

Chapter 1 makes Federal funds available to school districts "to meet the special needs of educationally deprived children" in certain schools. §552 of Chapter 1 (20 U.S.C. §3801) (emphasis added). Chapter 1 funds cannot be used to provide general aid for the entire school district. LEAs must use Chapter 1 funds "only for projects that are designed and implemented to meet the special educational needs of educationally deprived children" identified in accordance with the law. §200.52, 47 FR 52348, (November 19, 1982).[71]

To help ensure that Chapter 1 funds are used to meet the "special" needs of educationally deprived children, and not to pay for their regular education, the law contains a provision designed to make Chapter 1 funds "supplement, not supplant" the regular educational program supported by state and local funds.

The requirement to "supplement, not supplant" has several applications. These include the application of the supplement, not supplant provision to:

- o the distribution of regular non-Federal funds;
- o the distribution of special non-Federal funds;
- o the funding of programs which are "required by "law"; and
- o the program design arrangements for instructional services.

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71 This general rule is subject to certain limited exceptions such as the provision for schoolwide projects, §200.54, 51 FR 18410 (May 19, 1986), and the provision for certain limited, rotating, and supervisory duties for Chapter 1 personnel, e.g., lunchroom supervision and playground supervision. §204.22(d), 51 FR 18412 (May 19, 1986).

Each of these is discussed below.

The Distribution of Regular Non-Federal Funds

The supplement, not supplant provision requires that Chapter 1 funds be used "only so as to supplement and, to the extent practical, increase" the level of non-Federal funds that would in absence of Chapter 1 funds, be made available for the education of students participating in Chapter 1 projects. §558(b) of Chapter 1 (20 U.S.C. §3807(b)). And, "in no case may [Chapter 1] funds be used to supplant such funds from non-Federal sources." Id.

The Chapter 1 regulations essentially repeat the statutory language of the supplement, not supplant provision. §200.62(a), 47 FR 52439 (November 19, 1982). The June 1983 NRG describes "criteria that SEAs may choose in determining compliance" with the supplement, not supplant provision as it applies to the allocation of regular, non-Federal funds.[72]

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[72] The legislative history of the Education Amendments of 1978 stated that the Title I supplement, not supplant requirement:

> prohibits local educational agencies fromusing receipt of Title I funds by program participants as a basis for discriminating against such children in the provision of regular state and local funds. In other words, children participating in Title I programs must receive their fair share of regular state and local funds. They cannot be penalized in the provision of such state and local funds because they receive assistance under Title I.

H. Rep. No. 95-1137, 95th Cong. 2d Sess. (1978), at 29.

Under the heading of "[e]quitable distribution of regular non-Federal funds," the 1983 NRG states, at 24:

> It is a violation of the supplement, not supplant requirement if an LEA distributes State and local funds in a way that discriminates against children who participate in a Chapter 1 project. For example, an
>
> LEA could not --
>
> - Systematically assign a greater number of pupils per teacher in classes that include children who are receiving Chapter 1 services; or
>
> - Deny children who receive Chapter 1 services the opportunity to receive State and locally funded regular programs on the same basis as other children.[73]

The Distribution of Special Non-Federal Funds

Chapter 1 does not carry over from Title I a second supplement, not supplant provision applicable to special programs such as State or local compensatory education programs. §126(d) of Title I (20 U.S.C. §2376(d)). This second supplement, not supplant provision required federal funds to supplement "special" State and local funds provided "for the education of educationally deprived children, in the aggregate, in eligible school attendance areas or attending eligible schools." Id.[74] The concern this provision addressed was that LEAs not discriminate financially against educationally deprived children in Title I eligible areas and schools when they allocated funds for a "special program" or a "state phase-in program."[75] The provision was designed to ensure that educationally deprived children "in the aggregate" in Title I eligible areas and schools received their fair share of "special program" funds.[76] Chapter 1 does not contain this provision. The Chapter 1 regulations are silent on this issue. 47 FR 52340 (November 19, 1982).[77]

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[73] The December 1986 NRG, at 22, says the same thing except for the addition of the phrase "except as allowed in a replacement project" to the end of the second example above.

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[74] The legislative history of the Education Amendments of 1978 explained the purpose of the two Title I supplement, not supplant provisions:

> [T]he purpose of the supplanting provision with respect to the distribution of regular base state and local funds is to insure that children participating in Title I programs receive their fair share of such base funds. The purpose of the supplanting provision with respect to special state and local funds is to insure that educationally deprived children residing in Title I eligible areas qualifying for such funds, receive their fair share.

H. Rep. No. 95-1137, 95th Cong. 2d Sess. (1978), at 30.

[75] Title I defined a "special program" as a State or local compensatory education program which met certain statutory criteria; a bilingual program for children of limited English proficiency; and a special educational program for handicapped children or children with specific learing disabilities. §131(b)(1) of Title I (20 U.S.C. §2751(b)(1)). A "state phase-in program" was defined as a "state education program which is being phased into full operation" and which met eleven criteria set forth in the statute. §131(b)(2) and §131(d) of Title I (20 U.S.C. §2751(b)(2) and (d)).

The June 1983 NRG recognizes, at 24, that Chapter 1 no longer requires the equitable distribution of state and local compensatory education funds that Title I did. The NRG, however, does not provide any guidance for SEAs or LEAs that might wish to distribute such funds in a way that does not discriminate financially against educationally deprived children in Chapter 1 eligible areas and schools.

The absence of the Title I "in the aggregate" provision takes on added significance when coupled with a Chapter 1 provision which allows an exclusion (for certain special State and local programs) from compliance with the supplement, not supplant requirement. §558(d) of Chapter 1 (20 U.S.C. §3807(d)). As originally enacted, Chapter 1 had a provision allowing districts to exclude certain "State and local program funds" from a determination of compliance with the supplement not supplant mandate. §558(d) of Chapter 1 (20 U.S.C. §3807(d)). The excludable funds were described in very general terms:

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[76] The Title I regulations told LEAs how to compute a "fair share" of "special program" funds. §201.138, 46 FR 5180 (January 19, 1981). These regulations subsequently became guidelines. §201.130(b), 46 FR 18977 (March 27, 1981)

[77] The Title I regulations contained detailed provisions concerning the equitable distribution of "special program" funds. §201.136-201.138, 46 FR 5179-5180 (January 19, 1981). These regulations later became guidelines. §201.130(b),46 FR 18977 (March 27, 1981).

> . . . a local educational agency may exclude State and local funds expended for carrying out special programs to meet the educational needs of educationally deprived children if such programs are consistent with the purposes of this Chapter.

_Id_.

The original provision, which was modified by the 1983 Technical Amendments, meant that certain State and local program funds did not have to be considered in determining whether Chapter 1 funds were supplementing, rather than supplanting, the level of "special" non-Federal funds that would, in the absence of Chapter 1 funds, be made available for the education of Chapter 1 students. The State and local funds for "special programs" could be excluded if two conditions were met:

- the funds had to be "expended for carrying out special programs to meet the educational needs of educationally deprived children" and
- the "special programs" had to be "consistent with the purposes" of Chapter 1.

_Id_. The meaning of "consistent with the purposes" of Chapter 1 was not defined in the statute. ED declined to write a definition; the early supplement, not supplant regulation merely repeated the statutory language. §200.62, 47 FR 52349, (November 19, 1982).

Commentary, appended to the regulations, responded to requests of ED to clarify the meaning of "programs . . . consistent with the purposes" of Chapter 1. ED said:

> The term can be understood by referring to the declaration of policy in Section 552 of Chapter 1. . . . In order to be consistent with the purposes of Chapter 1, a program would have to be designed and implemented on the basis of the factors mentioned in section 552 of Chapter 1.[78]

47 FR 52362 (November 19, 1982).

The June 1983 NRG deemed a program "consistent with the purposes" of Chapter 1 if,

- o All children participating in the program are educationally deprived.
- o The program provides supplementary services designed to meet the special educational needs of the children who are participating.

The June 1983 NRG, at 24, describes the Chapter 1 exclusion provision as "a major change in the previous supplement-not-supplant requirement." The NRG states, at 24:

> Under Chapter 1, SEAs and LEAs are no longer required to provide children participating in a Chapter 1 project with an equitable share of state and locally funded services that qualify for an exclusion.[79]

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[78] The declaration of policy in §552 of Chapter 1 refers to meeting "the special educational needs of educationally deprived children"; and to "educational programs which will meet the needs of such children." ED's reference to "the factors mentioned in section 552 of Chapter 1" is not particularly helpful as a source of standards for programs that are "consistent with the purposes" of Chapter 1.

[79] The 1983 NRG states, at 25, ". . . programs that are designed to provide special services to handicapped children or bilingual services to children of limited English-speaking proficiency would not generally qualify for an exclusion."

In the 1983 Technical Amendments, Congress struck "if such programs are consistent with the purposes of this chapter." To define clearly which "special programs" qualified for the exclusion, Congress turned to §131(c) of Title I which contained criteria for an exclusion (of State and local compensatory education programs) from the Title I "excess costs" provision.[80] Congress cross-referenced the criteria in §131(c) of Title I and said programs meeting these criteria qualified for the

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[80] Section 131(c) of Title I (20 U.S.C. §2751(c) states:

> A State or local program meets the requirements of this subsection if it is similar to programs assisted under this part. The Commissioner shall consider a State or local program to be similar to programs assisted under this part if --
> (1) all children participating in the program are educationally deprived,
> (2) the program is based on performance objectives related to educational achievement and is evaluated in a manner consistent with those performance objectives,
> (3) the program provides supplementary services designed to meet the special educational needs of the children who are participating,
> (4) the local educational agency keeps such records and affords such access thereto as are necessary to assure the correctness and verification of the requirements of clauses (1), (2), and (3) of this subsection, and
> (5) the State educational agency monitors performance under the program to assure that the requirements of clauses (1), (2), (3), and (4) of this subsection are met.

Under Title I, the Secretary had to review the State law and regulations for a State compensatory education program and make an advance written determination whether the program met the requirements of §131(c) of Title I. §131(e) of Title I (20 U.S.C. §2751(e)). Title I required that an SEA do the same for a local compensatory education program seeking an exclusion. §131(f) of Title I (20 U.S.C. §2751(f)). Chapter 1 does not contain these review requirements.

Chapter 1 supplement, not supplant exclusion.[81] §558(d) of Chapter 1 (20 U.S.C. §3807(d)). (Nonetheless, a question arises whether State compensatory education services mandated by State statute can qualify for the exclusion. See the next section on the "required by law" aspect of the supplement, not supplant requirement.)

The regulations implementing the Technical Amendments reflect the statutory change and include the standards for the exclusion set forth in §131(c) of Title I. §204.32, 51 FR 1844 (May 19, 1986).[82]

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[81] As the legislative history of the 1983 Technical Amendments explained: "ECIA is ambiguous on the [non] supplanting . . . requirement for State and local special program funds. This amendment would clarify the limited exclusion . . . from the non-supplanting . . . requirement. The provision amends section 558(d) to clarify that exclusions for special program funds from [the] . . . non-supplanting requirement "are permitted only for State compensatory education programs that meet the requirements of section 131(c) of Title I . . . ." H. Rep. No. 98-51, 98th Cong. 1st Sess. (1983), at 6.

[82] The 1986 NRG, at 21, reflects the clarification made by the Technical Amendments; emphasizes that the exclusion is an option for LEAs; and refers to the SEAs' role in the exclusion:

> Section 558(d) permits the LEA to exclude certain State and local compensatory education program funds when determining compliance with the supplement, not supplant requirement. Services that qualify for this exclusion must meet the requirements in §204.32(b) of the regulations. Section 558(d) does not permit an LEA to exclude State and local funds expended for bilingual, handicapped, or State phase-in programs from determinations of compliance with this requirement.

[continued on next page]

The informal legal framework contains a June 1986 letter from ED to a State. The ED letter, which addresses both the application of the suplement, not supplant provision to preschool programs and the exclusion provision, states, in part:

> The Chapter 1 funds for preschool programs must supplement State-mandated preschool programs. In some cases, Chapterl-funded preschool programs may be considered as supplanting local funds. For example, if a [LEA] generates general revenue funds for providing preschool programs, Chapter 1-selected children have the same right to participate in these programs as any other children and must not be discriminated against in receiving services. However, if the local-funded programs meet the criteria in Section 204.32(b) of the Chapter 1 regulations, these funds may be excluded from determining compliance with the "supplement, not supplant" requirements of Chapter 1. The "supplement not supplant" requirements of Chapter 1 funds only refer to State and local funds and do not refer to the expenditures of other Federal funds.
>
> In a telephone conversation with . . . my staff, you asked if an LEA had no preschool program funded by State and local funds, would a Chapter 1 program for eligible children be considered supplementary. Such a program would be supplementary to the educational services generally provided by the LEA to children in the district and projects areas. [emphasis added]

The informal legal framework also contains the 1985 OMB Compliance Supplement for State and local auditors. This document, which does not reflect the 1983 Technical Amendments, contains the following "compliance requirements" and "suggested

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82 [continued from previous page]

> The LEA, and not the SEA, must decide if it will exercise the option of excluding State and local compensatory education funds in determining compliance with the supplement, not supplant requirement. However, the SEA must determine whether the LEA is using those funds for services that are similar to those that may be provided under Chapter 1.

audit procedures" for the supplement, not supplant provision:

Compliance Requirements (For Audit of LEA)

- An LEA may use Chapter 1 funds only to supplement, and to the extent practical increase, the level of funds that would, in the absence of Chapter 1 funds, be made available from non-Federal sources for the education of pupils participating in Chapter 1 projects.
- An LEA may not use Chapter 1 funds to supplant funds from non-Federal sources (Chapter 1 Regulations 200.62)
- An LEA may exclude state and local funds expended for carrying out special programs to meet the educational needs of educationally deprived children that are consistent with the purposes of Chapter 1. (P.L. 97-35, Sec. 558(b))(34 CFR 200.62)

Suggested Audit Procedures (For Audit of LEA)

- Review financial and pupil records and determine the expenditures for children participating in Chapter 1 projects.
- Ascertain the amount financed with Federal funds.
- Ascertain whether the expenditures for Chapter 1 pupils are greater than the expenditures of state and local funds by an amount that is no less than the cost of the Chapter 1 projects.
- Identify services provided to all children with state or local funds.
- Determine whether Chapter 1 funds were used to provide services that supplement or were additional to services that would be provided with state and local funds.

OMB Compliance Supplement (1985) at 3-4.

The LEA portion of the 1986 ED monitoring guide, at xviii, addresses the supplement, not supplant provision with a single question: "Does the LEA fail in any respect to meet the requirement to supplement, not supplant State and local funds?"

The "Required by Law" Provision

Except for State and local compensatory education programs which qualify for an exclusion, the supplement, not supplant provision does not permit Chapter 1 funds to supplant funds that would, "in the absence of such Federal funds, be made available from non-Federal sources for the education" of Chapter 1 students §558(d) of Chapter 1 (20 U.S.C. §3807(d)). With a limited exception, the same was true under Title I. §126(c) of Title I (20 U.S.C. §2751(c)). *See* §132 of Title I (20 U.S.C. §2752).

The Chapter 1 statute does not expressly address the issue of whether the supplement, not supplant provision would be violated if Chapter 1 funds were used to pay for services that an LEA was required by law to provide from State and local funds even if there were no Chapter 1 funds. The more common situations giving rise to the issue might involve LEAs that wanted to use Chapter 1 funds (instead of State and local funds) to pay for services they were required by law to provide with State and local resources, e.g., education of the handicapped, education of students with limited English speaking proficiency, or mandated remedial services for students who failed a minimum competency test.

The early Chapter 1 regulations did not mention the "required by law" aspect of the supplement, not supplant provision.[83] Commentary appended to the regulations indicated that

> commenters recommended adding language to the section expressly prohibiting LEAs from using Chapter 1 funds to provide services otherwise required by law, programs of bilingual education, English as a second language programs, or programs for handicapped children.

47 FR 52361 (November 19, 1982). ED declined to include standards for the "required by law" aspect of the supplement, not

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[83] The general "required by law" rule in the Title I regulations was that:

> An LEA may not use Title I funds to provide services --
> (1) That the LEA is otherwise required to make available under Federal, State, or local law; and
> (2) For which the LEA is required to pay using state or local funds.

§201.139, 46 FR 5179 (January 19, 1981). The Title I regulations, for a very short time, contained detailed explanations and examples showing how the general rule applied to services for handicapped children, children whose primary or home language was other than English, and children who failed to pass a minimum competency test with mandated remedial services. §§201.140-201.142, 46 FR 5180-5184 (January 19, 1981). These regulations became guidelines in March 1981.

Properly promulgated federal regulations which are consistent with the statute have the force and effect of law. Courts are not required to accord the same degree of deference to guidelines.

supplant provision and noted that:

> The Department's draft nonregulatory guidance offers extensive, though not exclusive, standards for determining compliance with the supplement, not supplant requirement. It is anticipated that information on this issue will also be included in the final document. Under these circumstances, the Secretary does not feel that the inclusion of Federal standards for supplement, not supplant are necessary in the regulations.

Id.

The June 1983 NRG, at 24, provides the following guidance:

> It is a violation of the supplement, not supplant requirement if an LEA uses Chapter 1 funds to provide services that the LEA is required to provide under --
>
> o Federal, State or local law.
>
> o A court order.[84]

The 1983 NRG also generally reflects (with less detail) the 1981 Title I "required by law" regulations that became guidelines. The NRG, however, provides no examples of how the "required by law" aspect of the supplement, not supplant provision applies to mandated remedial services as part of a minimum competency testing program.[85] Nor does the NRG expressly address the question whether State compensatory education (SCE) funds meeting the standards for exclusion from the supplement, not supplant requirement nonetheless cannot be excluded if, under a State statute, the SCE services are required by law. The language of the NRG, however, implies that Chapter 1 funds may not be used to provide any services required by State law. If this means, though, that Chapter 1 funds must supplement, not supplant, even SCE services meeting standards for exclusion, where a State statute indicates the SCE services are required by law, then the NRG may be inconsistent with Congress's intent in enacting the SCE exclusion.

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[84] The 1986 NRG, at 21, repeats this guidance.

[85] The 1986 NRG is also silent on this subject.

The 1983 NRG does discuss examples of permissible services for handicapped children and for children of limited English-speaking proficiency. With respect to permissible Chapter 1 services for handicapped children, the NRG states, at 29-30:

> In general, an LEA may not use Chapter 1 funds to provide special educational services that the LEA is required to provide to handicapped children under Federal or State law. An LEA, however, may use Chapter 1 funds to provide services to handicapped children -- without violating the supplement, not supplant requirement -- if the Chapter 1 services have all of the following characteristics:
>
> o The LEA designs its Chapter 1 project to address special needs resulting from educational deprivation, not needs relating to a child's handicapping condition;
>
> o The LEA sets overall project objectives that do not distinguish between handicapped and nonhandicapped participants;
>
> o The LEA --
>
> (A) Through the use of uniform criteria, selects children for participation on the basis of educational deprivation, not on the basis of handicap; and

> (B) Selects as participating handicapped children only those who can reasonably be expected to make substantial progress toward accomplishing project objectives without the LEA substantially modifying the educational level of the subject matter; and

- The LEA provides Chapter 1 services at intensities taking into account the needs and abilities of individual participants, but without distinguishing generally between handicapped and nonhandicapped participants with respect to the instruction provided.[86]

The informal legal framework contains a 1986 letter ED wrote to a U.S. Senator about a student's eligibility to be served by both a program for learning disabled children and Chapter 1. ED's letter, which relies on the "required by law" aspect of the supplement not supplant provision, states in part:

> As a result of a previous inquiry from you in the case of another [LEA], my staff requested from the . . . [SEA] . . . a copy of the . . . [SEA] . . . rules for serving children in a program for the learning disabled. A learning disabled child is considered handicapped under State and Federal rules and, therefore, the child's handicapping conditions must be served under the provisions of the State program for the handicapped. When a child's oral expression and vocabulary deficiencies are diagnosed as resulting from a specific learning disability, the child is by definition handicapped, and must be served by the program for the handicapped to address the learning disability. Under the supplement, not supplant requirements of Section 556(b) of Chapter 1, an LEA may not use Chapter 1 funds to provide special educational services that the LEA is required to provide to handicapped children under State laws. [emphasis added]

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[86] The 1986 NRG, at 26-27, provides similar guidance.

ED's letter to the Senator continues:

> There are conditions, however, under which Chapter 1 funds may be used to provide services to handicapped children without violating these requirements. One such condition exists when a handicapped child also has special educational needs that result from educational deprivation in addition to needs relating to a child's handicapping condition. If the LEA determines that a child has needs that relate to both handicapping and educational deprivation conditions, such a child may be served both in a Chapter 1 program designed to address his special needs that result from educational deprivation, and in a program specially designed to address his handicapping condition.

Regarding permissible Chapter 1 services for limited English-speaking students, the 1983 NRG says, at 30:

> In general, an LEA may not use Chapter 1 funds to provide special educational services that the LEA is required to provide to children of limited English-speaking proficiency under Federal or State law. An LEA may use Chapter 1 funds to provide services to children of limited English-speaking proficiency -- without violating the supplement, not supplant requirement -- if the Chapter 1 services have all of the following characteristics:
>
> o The LEA designs its Chapter 1 project to address special needs resulting from educational deprivation, not needs relating solely to a child having limited English-speaking proficiency;
>
> o The LEA sets overall project objectives that do not distinguish between participants of limited English-speaking proficiency and other participants;
>
> o Through the use of uniform criteria, the LEA selects children for participation on the basis of educational deprivation, not on the basis of limited English-speaking proficiency; and
>
> o The LEA provides Chapter 1 services taking into account the needs and abilities of individual participants but without distinguishing generally

> between children of limited English-speaking proficiency and other children with respect to the instruction provided. The LEA may use Chapter 1 funds to provide bilingual staff and secure appropriate materials, when such staff and materials are necessary to address the educational deprivation of limited English-speaking children.[87]

The informal legal framework contains a September 1983 letter ED sent to a State which submitted a Chapter 1 project for limited English-speaking students to ED's Joint Dissemination Review Panel. ED's letter, which expresses compliance concerns, quotes the supplement, not supplant provision and states, in part:

> Both the Office of Elementary and Secondary Education and the Office of the Inspector General have consistently interpreted this provision to prohibit use of Chapter 1 funds for programs which are required by law, since, in the absence of Chapter 1, funds from non-Federal sources would have to be provided to meet the legal requirement.
>
> A review of the . . . submission indicates that the special services provided by the district to meet the needs of limited English-speaking children is through the project. To the degree that these required services are paid for from Chapter 1 funds, Federal funds would be supplanting non-Federal funds in violation of Section 558(b). While Chapter 1 funds may be used to provide assistance to educationally deprived children who may be limited English speakers, the funds may not be used to meet the school district's responsibilities contained in the *Lau* decision. [emphasis added]

ED's letter goes on to express additional concerns and to urge the SEA to review the project and similar projects:

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[87] The 1986 NRG, at 27, contains similar guidance.

> We have additional concerns regarding project objectives and design, needs assessment, and the selection of project participants. On page 30 of our nonregulatory Guidance (June 1983), an example of permissible services for children of limited English-speaking proficiency is provided. We state that if Chapter 1 services have all of the following characteristics, the district may provide services to limited English-speaking students without violating Section 558(b) of the statute:
>
> * * *
>
> [ED quotes p. 30 of the NRG]
>
> * * *
>
> We urge that you review the . . . project for conformity to the Chapter 1 statute, and further suggest you review other projects in your State which serve limited or non-English speaking students to ensure that those projects also conform to Chapter 1 requirements.

Another ED letter (1985) responds to a State inquiry about whether, given a new state law requiring forty-two hours of in-service training for local administrators every two years, Chapter 1 supported in-service training could be counted toward meeting the requirement. ED's letter, which cites the supplement not supplant statute and refers to the "required by law" interpretation in the 1983 NRG, states, in part:

> In-service training that related to the special education of educationally deprived children is an allowable Chapter 1 activity. However, under the Department's interpretation of the Chapter 1 supplement, not supplant requirement, if local administrators count sessions of in-service training that are supported totally with Chapter 1 funds toward meeting the forty-two hour requirement, it would be necessary to disallow the Federal expenditures used to support those sessions. To be consistent with the supplement, not supplant requirement, the basic level of training required to meet the State requirement must be supported with State and local funds. Then, Chapter 1

> funds may be used to support supplemental training activities. Under these circumstances, we believe districts could provide, and local administrators could count, sessions of in-service training for which the basic training activities in each session were supported with State and local funds but for which supplemental activities were supported with Chapter 1 funds. Accordingly, districts may wish to design in-service training sessions that are jointly supported with State and local funds and with Chapter 1 funds. [emphasis added][88]

The most recent Chapter 1 regulations say nothing about the "required by law" aspect of the supplement, not supplant provision. 51 FR 18404 (May 19, 1986).

The Program Design Implications

The supplement, not supplant provision requires that Chapter 1 funds be used to provide supplemental, rather than substituted, services. As an extreme example, it would be a violation of the supplement, not supplant provision if a Chapter 1 student were to have 99 percent of all of his/her instruction paid for by Chapter 1 and 1 percent paid for by State and local funds.

The Chapter 1 statute does not address the issue of how the supplement, not supplant provision applies to the design of instructional services to insure that federal compensatory education funds are used to provide supplemental services and to ensure that participating students get their fair share of State and locally funded instructional services.

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[88] The Chapter 1 regulations do not expressly address the use of Chapter 1 funds for staff development. The Title I regulations did describe the extent to which Title I funds could be used for staff development. §200.60 and §200.75, 46 FR 5143 and 5144 (January 19, 1981).

Similarly, the Chapter 1 regulations do not provide any guidance on how the supplement, not supplant provision relates to instructional services.[89] ED did not feel that "the inclusion of Federal standards for supplement, not supplant [was] necessary in the regulations" because the NRG would provide guidance. 47 FR 52361 (November 19, 1982.)

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[89] The Title I regulations described six categories of program design models which reflected the supplement, not supplant provision, and, where appropriate, specified the circumstances under which LEAs had to contribute State or local resources so that participants would get supplemental services and would get their fair share of State and local resources. §200.94, 46 FR 5145-5148 (January 19, 1981). The six categories of models were (1) in-class, (2) limited pull-out, (3) extended pull-out, (4) replacement, (5) add-on, and (6) other. These regulations became "guidelines" after a new administration assumed office. §200.92, 46 FR 18976 (March 27, 1981).

These models did not require any particular instructional approach. The legislative history of the Education Amendments of 1978 emphasized this point: "Title I should not be construed to require any particular instructional strategy. OE should develop regulations which inform program administrators how to design 'in-class' as well as 'pull-out' programs." H. Rep. 95-1137, 95th Cong. 2d Sess. (1978), at 26-27. Chapter 1 expressly indicates that LEAs do not have to provide services outside the regular classroom or school program to demonstrate compliance with the supplement, not supplant provision. §558(d) of Chapter 1 (20 U.S.C. §3807(d)).

The June 1983 NRG contains examples of Chapter 1 instructional services that meet the supplement, not supplant requirement and states, in part, at 25:

> This section describes some examples of instructional services that comply with the Chapter 1 supplement, not supplant requirement. The examples describe project designs which, if operated in public schools, meet the supplement, not supplant requirement. Not all of the designs are appropriate ways of providing Chapter 1 services in private schools. Agencies are free to develop alternative approaches that are consistent with the Chapter 1 statute and regulations.

The 1983 NRG examples include an in-class project, a limited pull-out project, an extended pull-out project, an add-on project and a replacement project.[90] The examples are similar to the program design models contained in the Title I regulations and indicate that non-Chapter 1 resources are to be contributed to extended pull-out projects and replacement projects to insure that Chapter 1 funds supplement, not supplant.

The 1983 NRG, however, does not contain any discussion of how to compute the amount of the State and local contribution to an extended pull-out project or a replacement project to avoid a violation of the supplement, not supplant provision. Consequently, the 1983 NRG does not provide any guidance about whether LEAs may disregard a fraction of a full-time equivalent

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[90] The 1986 NRG, at 24, indicates that extended pull-out projects and replacement projects "will both be referred to as replacement projects."

(FTE) staff member in computing required local contributions or whether the required local contribution should be computed on a school building basis or a districtwide basis.

The informal legal framework includes two ED letters to States about these matters. In one 1985 letter, ED first addressed the lack of guidance and then drew upon the 1981 Title I regulations for guidance:

> As you know, the Department has not issued guidance on the computation of the excess costs of replacement models in Chapter 1 as contained in the Title I regulations. A strict reading of the current law and regulations is that no rounding or dropping of fractions is allowable. However, since Title I did allow certain dropping of fractions, we think the State has the authority to exercise the option. Section 200.94 of the Title I regulations allowed dropping of full-time equivalent staff persons. This was provided in response to a proposed regulation which did not allow rounding to the nearest number or dropping of fraction. Page 5198, Federal Register, Vol. 46, No. 12, dated January 19, 1981, contains the following comment and response:
>
>> Comment: Several commenters recommended deletion of the provision which allows agencies to round down to a whole number the number of State and locally paid staff required under an excess costs program.
>>
>> Response: A change has been made. Agencies may now round to the nearest whole number if they provide staff to the Title I project (emphasis added).

The ED letter then addresses the fraction of an FTE issue:

> We feel under Chapter 1, agencies may either round down or to the nearest whole number. It is clear, however, from both Section 200.94 and the comment/response section, though not clear in the regulation, that this option could only be exercised after a contribution had been made. In other words, if the

> computation resulted in .4 instructional staff, that contribution must be made, if if resulted in 1.4 staff, the .4 could be dropped.

In a another 1985 letter to a different State, ED took issue with the State because it was computing the required contribution on a school building basis rather than a district-wide basis. ED's letter states, in part:

> With respect to the . . . replacement model, you stated in your letter that in the absence of a published Federal statute, regulation, or comparable policy document, the [SEA] will continue to compute the required local contribution to the Chapter 1 project on a school building rather than a districtwide basis. We addressed this issue in our response of February 13, 1985, to . . . your agency's office of Federal Programs in which we state that in our discussions of the replacement model, the local school district has always been the unit on which the calculations are to be made. While a good deal of the discussion in that letter was based on the January 1981 regulation, the amendment published on March 27, 1981, also refers to "agency" as the unit to be used in computing local contributions for excess cost models. Section 200.94(d)(3) of that publication states that ". . . the agency may disregard a fraction of a full-time equivalent staff member. For example, if the full-time equivalent number of staff members is 3.6, the agency is only required to provide 3 non-Federally funded staff members" (emphasis added). For the reasons set forth in that letter and in this one, the recommendation in the [Program Review] report still stands.

The 1985 ED Program Review Guide, at 6, advises ED monitors to look for "possible violation of supplement, not supplant rules" when they encounter use of a replacement model.

The most recent Chapter 1 regulations do not refer to the program design aspect of the supplement, not supplant provision.

51 FR 18404 (May 19, 1986.) The 1986 NRG, however, addresses replacement projects in considerable detail. The 1986 NRG states, at 24:

> c. Replacement project. Extended pull-out projects and replacement projects will both be referred to as replacement projects. In both cases, Chapter 1 services are provided for a period that exceeds 25 percent of time -- computed on a per day, per month, or per year basis -- that a participating child would, in the absence of Chapter 1 funds, spend receiving instructional services from teachers who are paid with non-Chapter funds. A "replacement project" has the following characteristics:
>
> o Chapter 1 services are provided to participating children in a different classroom setting or at a different time than would be the case if these children were not participating in the Chapter 1 project.
>
> o The Chapter 1 project provides services which replace all or part of the course of instruction regularly provided to Chapter 1 participants with a program which is particularly designed to meet participants' special educational needs.
>
> o The LEA provides either the full-time equivalent number of staff that would have been used in the absence of the Chapter 1 services or the amount of non-Chapter 1 funds required to provide that number of staff. When an LEA has a replacement project serving students in more than one school, the appropriate number of staff persons or funds provided from non-Federal sources must be calculated on a districtwide basis. Fractional parts of full-time equivalent staff persons may be dropped.

The 1986 NRG, at 25-26, then provides examples of replacement projects for elementary and junior or senior high school and indicates how to compute the required local contribution. The example of an elementary school replacement project states:

> An LEA decides to provide some third and fourth grad-

ers with an intensive program in basic skills, using Chapter 1 funds. The program is to meet every day for two hours. Third and fourth graders ordinarily receive five hours of instructional services per day. The average pupil-teacher ratio for third and fourth graders is 24 to 1.

To determine the number of full-time equivalent staff required to be provided, the LEA --

> Determines the number of children served by a full-time equivalent teacher is 24 children on a full-time basis.
>
> Calculates the number of children served by the Chapter 1 project (80 children are served a 40 percent time; thus the project could serve 32 children on a full-time basis).
>
> Divides the number of full-time equivalent children by the number of such children served by a full-time equivalent staff member (32 divided by 24 equals 1.33).

In this example, one full-time teacher paid with LEA funds must be provided, or, alternatively, the LEA must provide an amount of non-Chapter 1 funds equal to the average salary of one teacher.

The example of a junior or senior high school replacement project states:

> An LEA decides to provide 200 ninth graders attending two different junior high schools (100 in each school) with a special, intensive remedial reading program in place of those students' regular English class. The replacement project uses a very low pupil to teacher ratio for one period per day (5 periods per week), out of the usual 30 period week. On the average, ninth grade English teachers teach five classes of 25 children each. The classes each meet for five periods per week.
>
> The LEA must provide either the full-time equivalent number of staff that would have been used in the absence of the Chapter 1 service to provide instruction in English, or the amount of non-Chapter 1 funds required to provide that number of staff.

> To determine the number of full-time equivalent staff required to be provided, the LEA --
>
> > Calculates the number of children served, on the average, by a full-time equivalent staff member (25 children multiplied by 5 classes equals 125 children served per day).
> >
> > Calculates the number of children served by the Chapter 1 project (200 children served per day).
> >
> > Divides the number of children served by the Chapter 1 project by the number of children served by a full-time equivalent staff member (200 divided by 125 equals 1.6).
>
> In this example, the LEA must provide either one full-time teacher paid with non-Chapter 1 funds or an amount of non-Chapter 1 funds equal to the average salary of one teacher.

ED has clearly chosen the NRG as the primary source of guidance on the supplement, not supplant provision. With two exceptions, the legal framework for the supplement not supplant provision appers to be internally consistent. The first potential inconsistency noted is between the "required by law" provision and the exclusion provision for State and local compensatory education funds. The potential inconsistency concerns whether funds for an SCE program which is required by State law and which meets the criteria for the exclusion, can qualify for the supplement, not supplant exclusion. The second inconsistency involves the 1985 OMB Compliance Supplement for auditors. This document, which does not reflect the 1983 Technical Amendments, is inconsistent with the Chapter 1 statute and regulations because it does not contain the criteria (added by the Technical Amendments) which must be met before State and local compensatory education funds can be excluded from compliance with the supplement not supplant provision.

COMPARABILITY

The basic Chapter 1 comparability requirement, unchanged from Title I, requires LEAs "to provide [with State and local funds] services in project areas which, taken as a whole, are at least comparable to services being provided in areas" not served by Chapter 1. Where all school attendance areas participate in the Chapter 1 program, LEAs must "provide [State and local] services which, taken as a whole, are substantially comparable in each project area." §558(c)(1) of Chapter 1 (20 U.S.C. §3807(c)(1)). Another Chapter 1 provision, however, new to the legal framework, states that an LEA "shall be deemed to have met" the comparability requirement:

> if it has filed with the State educational agency a written assurance that it has established --
>
> (A) A districtwide salary schedule;
>
> (B) A policy to ensure equivalence among schools in teachers, administrators, and auxiliary personnel; and
>
> (C) A policy to ensure equivalence among schools in the provision of curriculum materials and instructional supplies.

§558(c)(2). This provision also adds another new concept:

> unpredictable changes in student enrollment or personnel assignments which occur after the beginning of a school year shall not be included as a factor in determining comparability of services.[91]

An additional Chapter 1 provision, §558(d), substantively identical to its Title I predecessor, excludes from comparability determinations, at the election of an LEA, State and local funds expended for (1) compensatory education programs meeting certain requirements,[92] (2) "bilingual education for children of limited English proficiency," (3) "special education for handicapped children or children with specific learning disabilities," and (4) "State phase-in programs" meeting certain requirements.[93] The specific requirements for exemption of State or local compensatory education programs, and the exemptions for the other programs, resulted from the 1983 Technical Amendments.[94]

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[91] Title I §126(e) required an annual LEA comparability compliance report, not merely submission of assurances. Section 126(e) also required regulations implementing the comparability requirement where all LEAs school attendance areas participate in the program.

[92] These requirements are found in §131(c) of Title I, which is cross-referenced in §558(d) of Chapter 1 (20 U.S.C. §3807(d)). Several Title I-like features are required. There is no requirement, however, that the program be limited to low income areas of school districts. Section 131(c) is quoted at n. 80.

The comparability regulation, §200.60, merely restates the statutory requirements. One commenter

> stated that §200.60 lacks specificity and raised several questions about comparability. Are LEAs required to complete annual calculations to determine compliance with the comparability requirement? When should the calculations take place? Are the LEAs, upon completing the calculations required to make adjustments to staff or instructional supplies to overcome any discrepancies in comparability between project and nonproject schools?

51 FR 18419 (May 19, 1986). Responding to this comment ED stated:

> . . . The comparability requirements in §200.60 accurately reflect the statutory requirements in Section 558(c) and (d) of Chapter 1. Consistent with

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[93] The eleven requirements are found in §131(d) of Title I, which is cross-referenced in §558(d) of Chapter 1 (20 U.S.C. §3807(d)). The comparability exception for phase-in programs is designed to accommodate State experimentation with "comprehensive and systematic restructuring of the total educational environment at the level of the individual school." §131(d)(2). The most important requirements for exemption from comparability are limitation of the phase-in period to six years; express authorization for, and specific governance of the program by, State law; provision of supplemental services, not services replacing regular State and local funds; and the requirement that at least half the participating schools be "schools serving [Chapter 1] project areas which have the greatest number or concentrations of educationally deprived children or children from low income families." §131(d)(8).

[94] The Technical Amendments restored to the statute language from Title I that had been deleted when Chapter 1 was originally

[continued on next page]

> the intent of Chapter 1 to free schools of "unnecessary Federal supervision, direction, and control," the Secretary has not added to or defined the comparability requirements in the Chapter 1 regulations. Rather, SEAs have the flexibility to determine how comparability will be tested, as long as that determination is consistent with the statutory requirement in section 558.

ED's June 1983 NRG examines the comparability requirement, and includes review of Title I requirements and changes made by Chapter 1. (The review of Title 1 requirements and changes,

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[94] [continued from previous page] enacted in 1981. The Technical Amendments, however, did not restore all of the Title I comparability exemption provisions. Title I §126(e) had required advance determination of the legality of comparability exclusions. Determinations that State statutory and regulatory provisions met the Federal requirements for exclusion were to be made in advance by the Secretary. Advance determination of the legality of an LEA's proposed invocation of a comparability exemption was to be made by the SEA.

Although the exemptions for bilingual and special education funds and state phase-in programs did not exist from the time Chapter 1 originally was effective until the 1983 Technical Amendments were enacted, ED advised one state in a 1982 letter about options "for avoiding potential comparability problems resulting from such high-cost programs operating only in certain schools":

> We believe that it would be appropriate for an LEA to have one policy for its regular program and another for its special programs. The policy for the regular program must ensure equivalence in the provision of regular services among schools serving attendance areas based on the total number of children in each school. The policy with respect to special programs must ensure equivalence in the provision of special program services provided in Chapter 1 project and nonproject areas, based on the number of children in each attendance area who qualify for the special services.

however, is omitted from the 1986 NRG, though Title I regulatory standards are reprinted as an attachment.) The 1983 NRG announces several important points. First, in interpreting the applicability of Title I requirements to Chapter 1, the NRG states, at 31:

> The Title I statute . . . did not prescribe a particular methodology for demonstrating compliance with the comparability requirement. Although not specifically mandated by the statute, the Title I regulations contained long-standing criteria for determining compliance with the comparability requirements.

Second, with respect to LEA assurances, the NRG states, at 33, "an LEA must ensure that it complies with the assurances."[95] For this reason, LEAs "should retain documentation to show that they have implemented the policy contained in their assurances."

Third, the 1983 NRG discusses, at 33, the authority of States to implement specific enforcement methods:

> The statute in Section 558(c)(2), offers one test [submission of three assurances] for determining compliance with the comparability requirement. . . . States may establish alternative methods. . . . States may not, however, deny comparability to an LEA meeting the test contained in Section 558(c)(2). . . .

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[95] ED had indicated a similar view in the comments to the November 19, 1982 regulations. "Implicit in the concept of a required assurance is the requirement that the assurance be implemented." 47 FR 52363 (November 19, 1982). Thus, ED consistently has maintained that an LEA shall not be deemed to have met the comparability requirement merely by the act of filing assurances; assurances must be met. See also the 1986 NRG, at 30.

> The Chapter 1 statute and legislative history do not provide guidance on the meaning of the term "equivalence" as it is used in Section 558(c)(2). Each SEA, therefore, may wish to develop standards, e.g., . . . the criteria that were previously used to determine comparability of services under §201.116 of the Title I regulations. [Emphasis added.]

These passages of the 1983 NRG might be thought to raise a question. If an SEA chooses to define "equivalence" using "the criteria that were previously used . . . under the . . . Title I regulations," may the SEA "deny comparability to an LEA" not meeting these criteria, even though these criteria are not found in "the test contained in Section 558(c)(2)" of Chapter 1." The 1986 NRG eliminates this question, however, in language supporting SEA authority. The first sentence underscored above is omitted entirely. The immediately preceding sentence is changed to say SEAs may promulgate comparability standards that LEAs "must use." Another sentence, new to the 1986 NRG, says "States should provide guidance to LEAs on methods and procedures for ensuring" comparability. NRG (1986) at 29-30.

Fourth, the 1983 NRG states, at 34, that the "unpredictable changes" which can be disregarded in determining compliance "would not generally include those which the LEA knew, prior to the beginning of the school year, would occur, e.g., planned school closings, staff assignments."[96]

The August 1985 ED Program Review Guide suggests review for "lack of SEA monitoring of LEA comparability; lack of local documentation." The April 1985 OMB Compliance Supplement suggests the following audit procedures:

- o Review the systems by which the LEA determines and selects the level of service among the different schools, and evaluate for adequacy.
- o Examine information maintained by the LEA to determine comparability, e.g., district-wide salary schedule; policies to ensure equivalence among schools in teachers, administrators, and auxiliary personnel; policies to ensure equivalence among schools in curriculum materials and instructional supplies.
- o Review the application of the system.

The SEA portion of the 1986 ED monitoring Guide, at xii-

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[96] This statement in the NRG, however, raises the question whether ED would find "unpredictable" an event "unknown" prior to the beginning of school solely because administrators failed to plan properly. Where reasonable exercise of foresight would predict an event, failure to look ahead does not render that event "unpredictable." Clarification of this point would appear appropriate.

Neither the Title I comparability statute nor the regulations contained the term "unpredictable changes." The 1981 Title I regulations concerning "[m]aintaining comparability" did permit, "an LEA experiencing high student mobility" to avoid making adjustments needed to maintain comparability if it had the prior approval of the SEA and if it met certain criteria concerning the average number of children enrolled per instructional staff member in any school and the average per child expenditure of State and local funds for instructional staff in any school. §201.120, 46 FR 5176 (January 19, 1981).

xiii and xvi, provides the following guidance for federal monitors:

- o Describe the SEA's policy on comparability. Verify that the SEA has on file, before an applicant agency receives Chapter 1 funds, written assurances that it has established:

  (1) a districtwide salary scale
  (2) a policy to ensure equivalence among schools in teachers, administrators, and auziliary personnel; and
  (3) a policy to ensure equivalence among schools in the provision of curriculum materials and instructional supples. [] YES [] NO

- o Describe how the SEA verifies that State and local funds are being used to provide services in project areas which, taken as a whole, are at least comparable to services being provided in areas of the district which are not receiving Chapter 1 funds.

- o The assurances in the application conform to requirements in statute. [] YES [] NO

- o Describe how the SEA verifies that applicant agencies are honoring in practice their assurances.

- o Describe what action the SEA has taken (if any) against LEAs that fail to establish comparability of services, or do not have local documentation of their comparability.

* * *

- o Describe how the SEA verifies [while monitoring LEAs] that an applicant agency is in compliance with the assurances for comparability of services.

The LEA portion of the 1986 ED monitoring guide, at xxxvi, instructs federal monitors:

1. Examine the documentation on compar[a]bility (CEP will request information) to verify that the LEA has fulfilled that assurance during the current year.
2. Identify any practices that might provide the basis for an audit exception in the future.

In sum, the comparability legal framework generally is internally consistent; however, the 1983 NRG's interpretation of the "unpredictable changes" exemption appears to be too broad, and thus may be inconsistent with the basic comparability requirement.

PARENT INVOLVEMENT

Chapter 1 contains three provisions pertaining to parent involvement. First, §556(b)(3) requires that LEA Chapter 1 programs be "designed and implemented in consultation with parents" of the children being served. Second, §556(e), added by the 1983 Technical Amendments, requires LEAs to "convene annually a public meeting, to which all parents of eligible students shall be invited, to explain to parents" the Chapter 1 program and activities. This provision also states, "if parents desire further activities, the local educational agency may, upon request, provide reasonable support for such activities." Finally, §596(b)(3) states that GEPA §427, concerning parent involvement, "is superseded by §556(b)(3)" of Chapter 1.[97]

In enacting the original Chapter 1 legislation in 1981, the conference committee stated:

> The conferees believe that parental and teacher involvement is an important component of Title I [sic] programs and wish to make clear that it is an option of the local educational agencies to continue using Parent Advisory Councils (PACs) to comply with the consultation requirement.

H. Conf. Rep. No. 97-028 97th Cong. 1st Sess. (1981) at 748. In 1983, the House Committee recommending §556(e) (which added the initial parent meeting requirement) said:

> The Committee believes that, in order to effectively exercise their right of consultation during the course of the program's design and implementation, parents must first be made aware of the existence and nature of the program and of their right of consultation. This initial meeting will also provide an opportunity for parents to meet each other to facilitate continued

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[97] Section 124(j) of Title I, as amended in 1978, provided for individual parent participation in the establishment of local programs, the formulation of instructional goals, and the implementation of the program with respect to their own children. In addition, §125 of Title I required local educational agencies to establish a districtwide advisory council, elected by parents and composed of both parents of children served (who were entitled to a majority of the seats on the council) and representatives of children and schools eligible but not served. Section 125 also required parent-elected advisory councils at each project school, except for schools with very small projects. Local educational agencies were required to give advisory councils responsibility for advising in the planning, implementation and evaluation of the Chapter 1 program; to establish training programs for council members; and to provide councils or individual members with all relevant state and federal legal provisions and auditing, monitoring, or evaluation reports.

> communication among parents, since the primary initiative for formulating parental opinion rests with parents.

H. Rep. No. 98-51, 98th Cong. 1st Sess. (1983) at 5.

Discussing the 1983 amendment authorizing LEAs to support further parent involvement activities, the House Committee stated "timely responses to parents' recommendations . . . [are] an essential part of consultation between school officials and parents." Id. For its part, the Senate Committee considering the 1983 amendments stated its expectation that the initial parent meeting "will be one source of interaction among many," but the committee added that LEAs retained "discretion over how and when these interactions, including the . . . meeting, are to take place." S. Rep. No. 98-166, 98th Cong. 1st Sess. (1983) at 11.

The conference committee stated:

> The conferees agree that, in eliminating the House provision regarding the applicability of Sec. 427 of [GEPA] to ECIA the responsibility of the [LEAs] to assure adequate parental involvement shall in no way be diminished. Accordingly, LEAs shall have policies to assure parental consultation in the planning, development and operation of programs; assure that parents have had an opportunity to express their views concerning those policies, and; have policies to assure the adequate provision of program plans and evaluations to parents and the public.

H. Conf. Rep. No. 98-574, 98th Cong., 1st Sess. (1983) at 13.

Federal regulations require that discussion at the annual Chapter 1 parent meeting include:

> (i) Informing parents of the right to consult in the

> design and implementation of the agency's Chapter 1 project;
>
> (ii) Soliciting parents' input; and
>
> (iii) Providing parents an opportunity to establish mechanisms for maintaining ongoing communication among the parents, teachers, and agency officials.

§204.21(a)(1), 51 FR 18412 (May 19, 1986). The regulations suggest additional resources which LEAs may provide parents upon request: meeting space, materials, information on legal provisions and instructional programs, parent training programs and other appropriate resources. §204.21(b).

The regulations, in §200.53(b)(1), also require LEAs to develop written policies to ensure that parents of children served have "an adequate opportunity to participate in the design and implementation" of the Chapter 1 program.[98] The regulations include a list, not intended to be exhaustive, of activities which LEAs may consider in developing their parent involvement policies. The thirteen listed items are:

> (i) Notifying each child's parent in a timely manner that the child has been selected to participate in Chapter 1 and why the child has been selected.
>
> (ii) Informing each child's parents of the specific instructional objectives for the child.
>
> (iii) Reporting to each child's parents on the child's progress.

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[98] The 1983 Technical Amendments did not include the requirement for a written policy found in §200.53(b)(1) of the May 19, 1986 regulations.

(iv) Establishing conferences between individual parents and teachers.

(v) Providing materials and suggestions to parents to help them promote the education of their children at home.

(vi) Training parents to promote the education of their children at home.

(vii) Providing timely information concerning the Chapter 1 program including, for example, program plans and evaluations.

(viii) Soliciting parents' suggestions in the planning, development, and operation of the program.

(viv) Consulting with parents about how the school can work with parents to achieve the program's objectives.

(x) Providing timely responses to parents' recommendations.

(xi) Facilitating volunteer or paid participation by parents in school activities.

(xii) Designating LEA parent coordinators.

(xiii) Establishing parent advisory councils.

§200.53(b)(1), 51 FR 18410 (May 19, 1986).

These parent involvement regulations are more expansive than the regulations originally issued on November 19, 1982.[99] Section 200.53, promulgated before the 1983 Technical Amendments, merely repeated the original statutory provision for parent consultation, indicated that consultation with parents of children in private schools was to be included and stated that parent advisory councils were permitted, but not required. Responding in November 1982 to the recommendation of many commenters "that the regulations include standards for determining whether an LEA has complied with the consultation requirement," including "requirements that the consultation be meaningful, systematic and ongoing," ED said:

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[99] This is an interesting contrast with other regulations, such as those for comparability and supplement-not-supplant, which do not offer similar policy elaboration.

> . . . The Secretary has declined to establish additional requirements or criteria not stated in the statute regarding consultation. The Secretary believes that Chapter 1 was designed to afford SEAs and LEAs greater discretion in this area by avoiding, for example, a requirement that local parent advisory councils be established. The precise steps needed to achieve parent and teacher consultation are, in the Secretary's view, best left to local determination.

47 FR 52359 (November 19, 1982).

In issuing the more specific May 19, 1986 regulations, however, ED stated:

> The annual meeting should be the first step in an ongoing process of consulting with parents. It is not intended in itself to satisfy the requirement in section 556(b)(3) of Chapter 1.

51 FR 18406 (May 19, 1986). ED also stated:

> [S]chools must . . . afford parents the opportunity to become involved in critical choices regarding their children's education. . . .
>
> Parental involvement is particularly important in Chapter 1. Research has demonstrated that parental involvement increases the effectiveness of Chapter 1

> programs and makes a substantial contribution to the success of those programs. . . .
>
> To be beneficial, parental involvement in Chapter 1 must be meaningful and substantive; as such, it can take a variety of forms, best determined by the agencies that receive Chapter 1 funds. . . . Whatever the methods of encouraging parental involvement selected, the underlying objective must be to ensure that individual parents are effectively informed of their children's progress and encouraged and assisted in efforts to sustain or enhance that progress.

51 FR 18404-18405 (May 19, 1986) (emphasis added).

The objective of parent involvement required by Congress, however, may include empowering parents as an organized, effective, policy-influencing, and compliance-monitoring force in the community. This appears to have been contemplated by (1) the House committee, which said parents should take the initiative to communicate among themselves and thereby formulate parental opinion on the design and implementation of the Chapter 1 program; and (2) the Conference Committee, which in declaring GEPA §427 inapplicable said parental involvement should not thereby be diminished and expressly ordered LEA policies conforming to §427. ED's regulations mention parent councils, provision of information on legal standards, and parental advice in program planning and implementation; but, on the critical subject of parent training, the regulations reflect a narrower objective. They only explicitly mention training for home education. They do not suggest training in assessment of program size, scope, and quality, resource allocation equity, or legal compliance. They do not suggest training in techniques of parent organization; or improvement of parent organization effectiveness.

In this regard the May 19 regulations contrast with an ED memorandum to all State Chapter 1 coordinators issued eight days later:

> Training: To be meaningful, parent involvement must be based on adequate information which should include on a continuing and timely basis proposed and final project applications, needs assessment documents, budgetary information, evaluation data, copies of local, State and Federal laws, regulations, and guidelines, and any other Chapter 1 information needed for full effective parent involvement. This should be among the first priorities for training. Once this information base has been established the LEA may engage in a number of other training activities . . . such as . . .workshops to help parents work with their children at home.

M. J. LeTendre, Memorandum to State Chapter 1 Coordinators, May 27, 1986, at 2.[100]

Other informal legal framework documents do not go much further in elaborating LEA responsibilities with regard to parent involvement under Chapter 1. The August 1985 Program Review Guide suggests review for:

> Lack of State guidance; no specific plans; no activities other than annual meeting; no opportunities for parents to consult on plans, applications, the ongoing program or evaluation.

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[100] The May 27 memorandum contrasts with a 1982 ED letter, which said, "We do not believe . . . that we should promote any particular type of training activity."

The SEA portion of the 1986 monitoring guide, at ix, advises federal monitors to:

- o Describe the SEA's policies and practices in regard to parental involvement, including the parent-teacher consultation requirement.
- o Verify that the SEA's application review and approval process includes appropriate information on the parent-teacher consultation requirement.

The LEA portion of the 1986 ED monitoring guide, at xxxii, instructs federal monitors to:

- o Describe how the LEA has consulted with parents and teachers of children to be served as it designed and implemented the Chapter 1 program.
- o Describe the LEA's procedures for conducting the annual meeting to which all parents of participating children are invited.

In sum, there appears to be only one inconsistency in the parent involvement legal framework. Congressional reports and ED's May 27, 1986 memorandum suggest a policy-influencing role for parents. The May 19, 1986 regulations, however, state the objective of parent involvement is helping individual parents to enhance the educational process of their own children. Clarification of this issue would appear appropriate.

PARTICIPATION OF PRIVATE SCHOOL STUDENTS

Chapter 1 requires LEAs conducting Chapter 1 programs to "make provision for services to educationally deprived children attending private elementary and secondary schools . . . [t]o the extent consistent with the number of . . . [these children residing] in the school district['s]" Chapter 1 project areas. §§556(b)(5) and 557(a) (20 U.S.C. §§3805(b)(5) and 3806(a)).[101] Services must include "special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment)." §557(a). These services must "meet the requirements of §§555(c), 556(b)(1), (2),

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[101] The June NRG, at 35, clarifies that private school students residing in Chapter 1 project areas are eligible "even though such children are attending private schools outside the project area," and adds that an LEA "is not required to serve children who reside outside a project area but who attend private schools located within the project area."

Eligible children attending an institution that "qualifies as a private . . . . school under state law "may not be excluded from Chapter 1 merely on the ground their school "is not in compliance with other state laws." Id. at 36. LEAs, however, may require private schools to assure their compliance with Title VI of the Civil Rights Act of 1964 as a condition of their students' participation in Chapter 1, and private school officials may reject Chapter 1 services on behalf of their students. Id. The 1986 NRG, at 44, adds that upon such a rejection LEAs need not, but may, arrange private school students' participation through consultations with their parents. An ED Memorandum to State Chapter 1 coordinators dated March 5, 1986, however, states that if private school officials have rejected Chapter 1 services because of a dispute over whether the offer was equitable, "funds should remain in reserve until the dispute is settled."

(3) and (4), and 558(b)"[102] Id. Most important, Chapter 1 expenditures for private school students must "be equal (taking into account the number of children to be served and their special educational needs . . .) to expenditures for children enrolled in the public schools." Id.

Section 557(b) requires the Secretary to arrange direct provision of Chapter 1 services to private school students if an LEA "is prohibited by law" from doing so or "has substantially failed to provide for the[ir] participation on an equitable basis."[103] Section 557(b)(3)(A) contemplates that services provided under bypass arrangements be paid from LEA allocations:

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[102] The reference to §556(b)(1) in §557(a) was added by the 1983 Technical Amendments

> to ensure that the provisions for targeting areas and children for services, as they relate to private schoolchildren, are compatible with the provisions for public schools. An omission in ECIA as written might result in school districts having to serve all private schoolchildren who are educationally deprived without regard to the home school attendance areas that are compatible with the school districts' areas of concentration. There was no intent to set forth one criterion of eligibility for public schools and another for private.

H. Rep. No. 98-51, 98th Cong., 1st Sess. (1983) at 5. Section 555(c) is Chapter 1's general description of authorized program expenditures. Section 556(b)(2)-(4) are the LEA needs assessment, size, scope, and quality, and evaluation requirements. Section 558(b) is the supplement, not supplant provision.

[103] Implementation of this "bypass provision" is subject to several procedural requirements, including the rights of the SEA and LEA involved to administrative hearings and court review. The details of these provisions are beyond the scope of this paper.

> When the Secretary arranges for services pursuant to this subsection he shall, after consultation with the appropriate public and private school officials, pay to the provider the cost of such services, including the administrative cost of arranging for such services, from the appropriate allocation or allocations under this chapter.

A bypass "continue[s] in effect until the Secretary determines that there will no longer be any failure or inability on the part of the local educational agency to meet the requirements" for provision of services to private school students. §557(b)(3)(C).[104]

Under §596(c) of ECIA, the portions of GEPA §436 which "relate to fiscal control and fund accounting procedures" apply to Chapter 1. Section 436(b)(2) requires:

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[104] Section 557 of Chapter 1 is substantively identical to §130 of Title I. Section 124(b)(3) of Title I, however, expressly required LEA program evaluations to determine the degree to which the requirements of §130 were met. Chapter 1 contains no comparable provision. In recommending §130 in 1978, the House committee wrote:

> The Committee . . . wishes to emphasize that the school districts should publicize which attendance areas are eligible for Title I and the availability of services to eligible nonpublic school students in these areas. Where appropriate, efforts should be made to include private school personnel in the Title I needs assessment and program planning process. These goals can best be accomplished by the strengthening of OE regulations ensuring that adequate information is made available about private school children's eligibility for Title I services. . . .
>
> The Committee . . . recognizes there are serious problems with regard to the compliance of local educational agencies with the requirement of nonpublic school participation.

H. Rep. No. 95-1137, 95th Cong. 2d Sess., (1978) at 33-34.

> that the control of funds provided to the local educational agency under each program and title to property acquired with those funds, . . . be in a public agency and that a public agency . . . administer those funds and property.

Most of the Chapter 1 regulations concerning private school student participation were issued November 19, 1982.[105] They repeat statutory provisions and require that services be provided "[i]n consultation with private school officials" and "on an equitable basis."[106] §200.70(a)(1) and (b), 47 FR 52350 (November 19, 1982). On the question of equitability, the 1983 NRG, at 36 states:

> If the needs assessment reveals that the private school children have different educational needs than public school children, an LEA must consider those different needs in designing its Chapter 1 project.

The 1986 NRG, however, at 45, adds:

> The subject(s) or service(s) determined by the LEA to be the areas of greatest need of children in the

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[105] Provisions added by the May 19, 1986 regulations concerning details of the bypass procedure are beyond the scope of this paper.

[106] ED correspondence expressly indicates the "equitable basis" requirement demands more than equal expenditures. Were an LEA to provide private school students no instruction, but only one-time consumable materials, services would not be considered equitable, despite equality of expenditure. Letter from M. J. LeTendre to M. A. Smith, April 17, 1986. ED has said, "that equitability is determined by a myriad of factors." Letter from M. J. LeTendre to J. P. McElligott, July 25, 1986. These concepts are also reflected in ED "Question and Answer" documents reviewed below.

> project area must be the same for all children. Therefore, the subject(s) or service(s) provided in the project area should be the same regardless of whether the children attend public or private schools.

Similarly, the 1986 NRG states, "if the LEA selects only elementary level project areas, it should serve private school children only at the elementary level." Id. It adds, however:

> An LEA has the flexibility to provide services to private school children at different grades within a level, e.g., at the elementary level, grades 1-3 in the public schools, and grades 4-6 in the private schools.

Id. Further comments in the 1986 NRG on the requirements and limits of service equitably include:

> In general, LEAs are not required to establish a separate Chapter 1 program for private school children when the school they attend enrolls less than ten eligible children. The minimum number is a guide only -- in some instances, it may be possible and desirable to set up programs and, in these cases, LEAs should do so. Where no separate program is established, private school children must be offered an opportunity to participate in the program being operated for public school children.

Id. at 44. Also, since actual, not planned, expenditures must be equal, "if adjustments to the program are needed during the school year to ensure private school students are equitably served, they should be made." Id.

For situations where eligible private school students reside in attendance areas unserved by Chapter 1 because, in accordance with §556(d)(5) of the statute and §200.50(b)(5) of the regulations, SCE funds are used there instead, the 1986 NRG offers the following guidance:

> In implementing this provision [the "SCE-skip" option allowed by §556(d)(5)], the statute requires the LEA to determine the number of children in private schools to receive Chapter 1 services . . . as if no skipping had taken place . . . .
>
> For example, if the LEA determines that, absent . . . [SCE funds] . . . the LEA would serve three attendance areas, it should determine the number of private school children in those areas who would be served. Assume that for all three areas a total of 36 children would be served. If non-Chapter 1 funds are used to serve one of the three areas, enabling Chapter 1 funds to serve a fourth area, private school children from all four attendance areas are eligible. The LEA thus should select a total of 36 private school children -- including those most in need of assistance -- to be served from all four attendance areas.

Id. at 12-13.

The regulations, in §200.72, state that Chapter 1 funds may not be used to meet the "needs of the private schools" or the "general needs of the children in the private schools." Section 200.75 also expressly prohibits use of Chapter 1 funds "for repairs, minor remodeling, or construction of private school facilities." The regulations contain several provisions designed to ensure LEAs "exercise administrative direction and control over Chapter 1 funds." §200.70(c). Under §200.74:

> (c) The public agency shall ensure that the equipment or supplies placed in a private school-
> (1) Are used for Chapter 1 purposes and
> (2) Can be removed from the private school without remodeling the private school facility.
> (d) The public agency shall remove equipment or supplies from a private school if-
> (1) The equipment or supplies are no longer needed for Chapter 1 purposes; or
> (2) Removal is necessary to avoid use of the equipment or supplies for other than Chapter 1 purposes.

Under §200.70(d):

> (1) Provision of services to children enrolled in private schools must be provided by employees of a public agency or through contract by the public agency with a person, an association, agency or corporation who or which, in the provision of those services, is independent of the private school and of any religious organizations.
>
> (2) This employment or contract must be under the control or supervision of the public agency.

The 1986 NRG, at 46, clarifies this regulation as follows:

> Chapter 1 services may be provided by persons not independent of the private school or of a religious organization, if they are employed directly by the LEA, as long as the services are provided at a time when the person is not being paid by the private school. During the time that the person is providing Chapter 1 services, he/she must be under the supervision and administrative control of the LEA and must have no responsibilities to the private school.[107]

Finally, §200.73 allows placement of public employees in some private facilities, under the following conditions:

> An LEA may use Chapter 1 funds to make public employees available in other than public facilities-
> (a) To the extent necessary to provide equitable Chapter 1 services designed for children in a private school; and

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[107] ED's Program Review Guide and OMB's Compliance Supplement address the consultation, public control, and service equitability requirements reviewed above only in general terms. For example, the suggested audit procedures in the OMB Compliance Supplement are as follows:

- o Review procedures for determining numbers and needs of educationally deprived children in private schools and evaluate for adequacy.
- o Ascertain Chapter 1 services provided to such children and determine whether those services have been provided on an equitable basis.

(b) If those services are not normally provided by the private schools.

This regulation, however, was written prior to the Supreme Court's decision in Aguilar v. Felton, 473 U.S. _____, 105 S.Ct. 241, 53 U.S.L.W. 5013 (July 1, 1985). In Aguilar the Supreme Court held instruction by Chapter 1 teachers in "pervasively sectarian" environments violated the constitutional requirement for separation of church and state (the Establishment Clause). After finding the environment of the Catholic schools involved to be pervasively sectarian, the Court held that LEA supervision of the private school Chapter 1 teachers, necessary to ensure the absence of any religious message in their teaching, required "excessive entanglement" of public officials with religious institutions. Id.[108]

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[108] Since Aguilar restricts Chapter 1 services provided in "pervasively sectarian" environments, services in nonreligious private schools are not affected by the decision. The Court in Aguilar distinguished the schools involved in that case from church-owned post-secondary institutions found not to be pervasively sectarian in past cases; however, the Court also said that alleged differences in "the degree of sectarianism" of the Catholic schools involved in Aguilar had "little bearing" on the Court's analysis.

The services Aguilar specifically prohibits in pervasively sectarian environments are those (1) which must be supervised or monitored to ensure no religious message is communicated, and (2) which must be supervised and monitored in a way which "excessively entangles" public officials in the affairs of pervasively sectarian institutions. Public electric, water, and sewer services can be provided in pervasively sectarian environments because the required monitoring is not very "entangling" and relates solely to the amount of the bill; there is no need for monitoring to ensure absence of religious content. Live instruction in pervasively sectarian environments by publicly-

[continued on next page]

After the Aguilar decision, ED issued two documents, in question and answer form, providing guidance to state and local educational agencies. Department of Education, "Guidance on Aguilar v. Felton and Chapter 1 of the Education Consolidation and Improvement Act (ECIA), Questions and Answers" (August 1985) (Guidance); and "Additional Guidance on Aguilar v. Felton and Chapter 1 of the Education Consolidation and Improvement Act (ECIA), Questions and Answers" (June 1986) (Additional Guidance). In the Guidance, at 1, ED, citing Wolman v. Walter, 433 U.S. 229, 246-247 (1977), stated that instructional services for children in religiously affiliated private schools "must be provided at sites that are 'neither physically nor educationally identified

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108 [continued from previous page] paid teachers, however, requires regular monitoring; this monitoring, moreover, must occur in the sectarian environment. This creates "excessive entanglement." Is the problem overcome if the teacher is physically located in a public building and the private school children receive live instruction by television? Does provision of the television set (or a computer, for computer-assisted instruction), however, present another monitoring problem, different from those just noted? Use of the equipment may require monitoring to prevent use for non-Chapter 1 purposes, or by ineligible private school students. Would monitoring of this kind require "excessive entanglement"? (ED correspondence with one State director suggests "entanglement" can be avoided through use of "dumb" computer terminals -- where "functions are limited to the Chapter 1 program content transmitted via telephone lines, access is controlled by an ID number or student name," and the computers "do not have a disc port, and are limited to 10K of memory." Letter from D. R. Kearns to M. J. LeTendre, October 11, 1985, and response, December 10, 1985.)

Aguilar was a 5-4 decision. Establishment Clause jurisprudence is complex, without firmly settled legal tests governing all aspects of the future cases which might arise.

with the functions of the private school.'" The Additional Guidance, at 3-4, added:

> The Court has not ruled on the constitutionality of placing a mobile or portable unit on property belonging to a religiously affiliated private school, and there may be differing views on this subject. Given existing case law, it is the view of the Department of Education that . . . [mobile units may be so placed] if the following conditions are met:
>
> 1. The property is at a sufficient distance from the private school building(s) so that the mobile or portable unit is clearly distinguishable from the private school facilities used for regular (non-Chapter 1) instruction.
>
> 2. The mobile or portable unit is clearly and separately identified as property of the LEA and is free of religious symbols.
>
> 3. The unit and the property upon which it is located are not used for religious purposes or for the private school's educational program.
>
> 4. The unit is not used by private school personnel.

The Additional Guidance at 6, offered the following examples of property meeting these conditions:

> 1. Land near the school that is separated from the school by an undeveloped plot of land or other terrain features and that is used neither for religious purposes nor for the school's educational program.
>
> 2. A portion of a private school playground that is fenced in and has direct access to a public street.
>
> 3. Those portions of a parking lot that are not immediately adjacent to the private school.

The Additional Guidance also suggested that, before placing mobile units on private school property, an LEA "determine that other locations . . . are unsafe, impracticable, or substantially less convenient for the children to be served," and that the LEA "enter into a lease arrangement . . . for the use of the land." Additional Guidance at 5.

ED also addressed several other issues in these two sets of guidance. The Guidance, at 1, stated that "on-premises testing for student selection is not prohibited under Aguilar," since "Wolman v. Walter distinguished the role of the diagnostician from that of the teacher or counselor with regard to services in the private school." The Additional Guidance, however, at 2-3, stated that consultations between Chapter 1 teachers and those of private schools, intended to coordinate instruction, "should not occur at the site of the Chapter 1 services while the services are being provided." ED suggested that "consultation occur at a public school site, other neutral sites, or by telephone."

The Guidance, at 7, states that a private school student may "take onto private school premises Chapter 1 instructional materials for his or her use as a part of the child's Chapter 1 program."

With respect to the placement of computer-assisted instruction (CAI) equipment on the premises of religiously-affiliated private schools, the Additional Guidance, at 8-9, stated:

> 1. As with all Chapter 1 programs serving private school children, the CAI program must be under the LEA's direction and control. On-site review by public school officials must be limited, however, to such things as the installation, repair, inventory, and maintenance of equipment.
>
> 2. Private school personnel may be present in the CAI rooms to perform limited non-instructional functions

> such as to maintain order, to assist children with equipment operations (such as turning the equipment on and off, demonstrating the use of the computers, and accessing Chapter 1 programs), and to assist with the installation, repair, inventory and maintenance of the equipment.
>
> 3. Neither public nor private school personnel may assist the students with instruction in the CAI room. Public school personnel may, however, assist by providing instruction through computer messages, by telephone or by television.
>
> 4. Access to the computer equipment and the rest of the program must be limited to Chapter 1 eligible children.
>
> 5. Equipment purchased with Chapter 1 funds may not be used for other than Chapter 1 purposes. Only software directly related to the Chapter 1 program may be used with the CAI.
>
> . . .
>
> [Emphasis in original.][109]

In addition to discussing restrictions on the manner in which Chapter 1 services are provided to private school students, ED elaborated the requirements for equitability of services. The Guidance, at 4-5, stated:

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[109] The Guidance and Additional Guidance provide several specific, practical suggestions, as our review indicates. Readers of these ED documents might also be assisted if ED discussed the concepts and reasoning used by the Court in Aguilar. Awareness of the concepts, "pervasively sectarian environment," and "excessive entanglement," and familiarity with the Court's reasoning in finding both in Aguilar, are helpful to understanding the rationale for, and to assessing the validity of, the specific suggestions ED makes.

> [S]ervices may be considered equitable if--
>
> a. The LEA assesses, addresses, and evaluates the private school children's specific needs and their educational progress on the same basis as public school children.
>
> b. The LEA provides, in the aggregate, about the same amount of instructional time and materials for each private school child as compared with each public school child.
>
> c. The instructional services cost about the same. Section 557(a) of Chapter 1 of ECIA requires "equal" expenditures for private and public school students. Thus, the cost per eligible child must be considered in determining equitability. However, cost is not the sole means of determining equitability.
>
> d. The private school child has an opportunity to participate equitable to the opportunity of a public school child. In one school district the opportunity may be at another site during the school day. In another, it may be outside of regular school hours. Any alternative must be evaluated in the light of local conditions. Other factors should be considered, including the level of educational service, the age of the children to be served, the time lost in travel, availability of transportation, distance, weather, supervision, safety, and the opportunity for and the rate of participation.

The Guidance also clarified, at 6, that administrative and auxiliary costs, such as transportation, necessary to serve private school students must "come from the LEA's whole allocation, so that Chapter 1 instructional services may be provided on an equitable basis to both public and private school children." (Emphasis added.)

The Additional Guidance, at 10-11, also discussed the equitability of CAI services as follows:

> When CAI is being provided to private school children while public school children are receiving direct instruction from a teacher, the question of equitability is. . . difficult. . . .
>
> Whether the services provided by an LEA to private school students are equitable to those provided to children in public schools is measured by factors . . . such as whether the private school children's needs are addressed on the same basis as public school children, whether the services cost about the same, whether the opportunity to participate is about the same, whether the services are relatively convenient, and whether the quality of the services is comparable. If the CAI alone does not provide this equity, the LEA may make up the difference by offering additional services, such as tutorial centers or appropriate summer school programs.

In concluding, the Additional Guidance, at 12, discussed ED's auditing policy:

> Department officials responsible for issuing final audit determinations do not intend . . . to disallow expenditures consistent with . . . this guidance and the guidance issued on August 15, 1985, or consistent with another reasonable reading of Felton and other Establishment Clause cases. . . . Nothing in this answer, however, in any way excuses an LEA or SEA from fully complying with applicable statutes and regulations, including the Chapter 1 equitable services requirement.[110]

Included in the informal legal framework is the 1986 ED monitoring guide. The SEA portion of the document, at xi-xii, tells federal monitors to:

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[110] The Guidance and Additional Guidance address other specific matters concerning the details of serving private school students. Our discussion has been limited to those portions of the documents addressing the most significant policy issues.

- Describe the SEA's procedures for providing "equitable" services to private school children. (Felton)
- Verify that applications from LEAs contain an assurance that the programs serve educationally deprived children in private schools in accordance with Section 557. [ ] YES [ ] NO
- Describe how the SEA verifies that the LEA has administrative direction and control over the Chapter 1 funds and equipment that benefit the eligible private school children.
- Describe how the SEA verifies that the LEA has conducted a needs assessment to determine services to be provided to private school children.

The LEA portion of the 1986 ED monitoring guide, at xxxiii-xxxiv, instructs federal monitors to:

- Describe how the needs of educationally deprived nonpublic school children have been assessed.
- Describe how private school officials, teachers and parents are involved in the project planning and evaluation.
- Describe how the LEA maintains administrative direction and control over delivery services to private school children.
- Effects of Felton: 1985-86:
  1986-87:
- Describe how services to private school children are determined to equitable.
- Examine file documenting refusal of Chapter 1 service (sign-off).

In sum, the statute and ED's documents are internally consistent, though §200.73 of the regulations (placement of public employees in some private facilities) must be read with ED's

Guidance and Additional Guidance to avoid misunderstanding. Whether the latter documents are fully consistent with the Establishment Clause, however, is a complex question of constitutional jurisprudence. We have not attempted to answer that question here.

LOCAL EVALUATION, RECORD KEEPING AND REPORTING

Chapter 1 contains three provisions pertaining to program evaluation by LEAs. First, the major Chapter 1 evaluation provision, §556(b)(4) (20 U.S.C. §3805(b)(4)), as amended by the 1983 Technical Amendments, requires LEAs to assure that their programs and projects:

> will be evaluated in terms of their effectiveness in achieving the goals set for them, and that such evaluations shall include objective measurements of educational achievement in basic skills and a determination of whether improved performance is sustained over a period of more than one year, and that the results of such evaluation will be considered by such agency in the improvement of the programs and projects assisted under this chapter.

Second, §556(d)(9) (20 U.S.C. §308(D)(9) authorizes schoolwide projects permitted by §133(b)-of Title I. Paragraph 6 of the latter provision required "procedures for evaluation . . . [of the schoolwide projects] and opportunities for periodic improvements . . . based on the results of those evaluations. Third, §591(b) of ECIA (20 U.S.C. §3871(b) prohibits federal regulations "relating to the details of . . . evaluating programs and projects by . . . local educational agencies."[111]

The Chapter 1 regulations repeat the requirements of §556(b)(4), adding only that evaluations be done at least once every three years. §204.23(b)(1), 51 F.R. 18413 (May 19, 1986).[112]

ED's June 1983 NRG observed, at 15, "Chapter 1 contains less specific requirements for evaluation than those specified in Title I." The NRG contemplated SEAs would play a role "[i]n approving evaluation designs that meet Chapter 1 requirements," however, and added, "[t]he models described in §§201.172--201.174 of the Title I regulations are appropriate evaluation designs, . . . [but t]he Department does not require the use of those, or any other, particular models." The 1986 NRG, at 41, makes the same point, and suggests that SEAs, to meet their own evaluation obligations, "may wish to require that . . . LEAs use specific instruments to measure achievement or specific evaluation designs." The 1986 NRG includes as an attachment the Title I regulations describing the previously required evaluation models. The 1986 NRG also adds, at 41:

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[111] Sections 124(g) and 183(b) and (d) of Title I, as amended in 1978 had required, in each State, annual evaluations, conducted in accordance with federally developed models, of a representative sample of district Title I programs. The evaluation models were specified in §§201.172-201.174 of the Title I regulations. 46 FR 5188-5189 (January 19, 1981). Section 124(g) also expressly required evaluation of the degree to which the requirements for private school student participation had been met.

[112] Responding to a comment that this three-year evaluation interval was confusing, given the two-year interval for State evaluations, ED said, "An SEA may require more frequent evaluations . . . if the SEA needs those evaluations to meet the SEA's evaluation requirement." 51 FR 18422 (May 19, 1986).

> To determine the sustained effects of the program over a period of more than one year, the LEA should include the achievement results of those students who have participated in Chapter 1 over a period of time, not just those students who remain in the program every year. For example, a sustained effects analysis conducted in school year 1986-87 should include achievement results of all children who participated in Chapter 1 during either or both school years 1985-86 and 1986-87.

Section 596(c) of ECIA (20 U.S.C. §3876(c)) removes the Chapter 1 program from all but the "fiscal control and fund accounting" provisions of GEPA §436 (20 U.S.C. §1232e); thus, the program reporting and evaluation provisions of §436(b)(4), and (6) do not apply to Chapter 1 programs. As a result, there are no applicable GEPA provisions obligating LEAs to evaluate Chapter 1 programs.

LEAS, however, could be required by the Secretary to evaluate their programs and to report the results to ED, if the Secretary requested the evaluations under GEPA §417. Such action by the Secretary, though, would have to consider, and avoid conflict with, the prohibition in §591(b) of ECIA (20 U.S.C. §3871(b) against regulations "relating to the details" of LEA program evaluation.

The LEA portion of the 1986 ED monitoring guide, at xxx, instructs federal monitors to:

- Describe the LEA's procedure for evaluation of the effectiveness of the Chapter 1 program.
- Describe how the evaluation procedures include objective measurements of educational ac[h]ievements in basic skills.
- Describe how the evaluation procedures include a determination of whether improved performance is sustained over a period of more than one year.
- Describe (if applicable) the LEA's exemplary projects or practices.

Chapter 1 includes two record keeping and reporting provisions applicable to LEAs, and GEPA contains two additional provisions applicable to Chapter 1. Section 556(b) of Chapter 1 (20 U.S.C. §3805(b)) requires each LEA to assure it "will keep such records and provide such information to the State educational agency as may be required for fiscal audit and program evaluation."[113] Also, LEAs using the supplement-not-supplant exclusion for special program funds (such as SCE appropriations) must "keep[] such records and afford such access thereto as are necessary to assure the correctness and verification of the requirements" for the exclusion. §558(d) of Chapter 1 (20 U.S.C. §3807(d); §131(c)(4) of Title I (20 U.S.C. §2751(c)(4)).

Under §437(a) of GEPA (20 U.S.C. §1232f(a)), LEAs are required to keep for five years after completion of any federal program activity:

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[113] Section 127 of Title I, as amended in 1978, had imposed a similarly broad record keeping and reporting obligation. This provision also expressly required an annual report to the State.

> records which fully disclose the amount and disposition . . . of those funds, the total cost of the activity for which the funds are used, the share of that cost provided from other sources, and such other records as will facilitate an effective audit.

Finally, GEPA §436(b)(3) (20 U.S.C. §1232e(b)(3)), applicable under §596(c) of ECIA (20 U.S.C. §3876(c)), requires each LEA to assure it "will use fiscal control and fund accounting procedures that will ensure proper disbursement of, and accounting for Federal funds paid."

The Chapter 1 regulations require of LEAs record keeping identical to that required of the states. Thus, in addition to repeating the Chapter 1 and GEPA statutory requirements, the regulations expressly require LEAs to keep records "that show compliance with Chapter 1 requirements." §204.10(b)(3) and (2), 50 F.R. 18416 (April 30, 1985). Records must be kept "until all pending audits or reviews concerning the Chapter 1 project have been completed and . . . all findings and recommendations arising out of any audits . . . have been finally resolved," but for no less than five years after completion of the activity to which they pertain. §204.10(c).[114] LEAs must afford evaluating reviewing or auditing federal officials access to records and appropriate personnel. §204.11.

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[114] Prior Chapter 1 and Title I versions of this regulation, with the comments of the June 1983 Nonregulatory Guidance, are reviewed above at note 70.

There are no informal documents which add to the legal framework, and all regulations are consistent with the statutory provisions.

CARRYOVER OF FUNDS

Section 412(b) of GEPA (20 U.S.C. §1225(b) governs the availability of appropriations and provides that funds which are not obligated and expended in one fiscal year can be carried over for obligation and expenditure in the next fiscal year:

> Notwithstanding any other provision of law, unless enacted in specific limitation of the provisions of this subsection, any funds from appropriations to carry out any programs to which this title is applicable during any fiscal year which are not obligated and expended by educational agencies or institutions prior to the beginning of the fiscal year succeeding the fiscal year for which such funds were appropriated shall remain available for obligation and expenditure by such agencies and institutions during such succeeding fiscal year.

Any such carryover funds must be obligated and expended in accordance with:

> (A) the Federal statutory and regulatory provisions relating to such program which are in effect for such succeeding fiscal year, and
>
> (B) any program plan or application submitted by such educational agencies or institutions for such program for such succeeding fiscal year.

§412(c) of GEPA (20 U.S.C. §1225(c)).[115]

The early Chapter 1 regulations address carryover funds by stating:

> (a) An SEA or any other agency that receives Chapter 1 funds may obligate funds during the Federal fiscal year for which the funds were appropriated and during the succeeding Federal fiscal year.
>
> (b) The SEA or any other agency shall return to the Department any funds not obligated by the end of the succeeding Federal fiscal year.
>
> (c)(1) Chapter 1 funds are obligated when an SEA or any other agency --
>
> (i) Commits funds, according to State law or practice, to the support of specific programmatic or administrative activities; and
>
> (ii) Identifies Chapter 1 funds allocated for a particular Federal fiscal year as supporting those specific programmatic or administrative activities.
>
> (2) For purposes of this section, the SEA's distribution of funds to any other agency is not the obligation of those funds.

§204.14, 50 FR 18417 (April 30, 1985)(previously designated as § 200.64, 47 FR 52350 (November 19, 1982)).[116]

The informal legal framework indicates that carryover funds should be reviewed by federal monitors and State and local auditors. The 1985 ED Program Review Guide, at 2-3, identifies some "possible problems" for federal monitors to consider:

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[115] The EDGAR regulations implementing the carryover provision do not apply to Chapter 1. See 34 CFR §§76.705-706(1985).

[116] A series of articles in the Miami News in December 1985 asserted, in part, that many States were in violation of a

[continued on next page]

Excessive carryover in some agencies; no State action to reduce; lack of reports; carryover data not included on applications.
Grantees or SEA itself lacks documentation that funds for a fiscal year were expended within the 27-month period; lack of close-out procedures.

The SEA portion of the 1986 ED monitoring guide, at iii-iv, advises federal monitors to:

- Describe the SEA's procedure to ensure control of carryover funds.

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[116] [continued from previous page] Federal rule requiring States and LEAs to spend at least 85 percent of their allocations annually. ED refuted this charge in an internal report prepared in response to the articles. As ED said, in part:

> According to the Miami News, 26 States were in violation at the end of school year 1983-84 of a Federal rule requiring States and LEAs to spend at least 85 percent of their allocations annually. Actually the statute stipulates they must receive 85 percent of their previous year's allocation. The Miami News statement is untrue, because there is no rule, nor has there ever been one, specifying the amount of funds that can be carried over, or that must be spent annually.

"Chapter 1 and the Miami News, An Evaluation and Assessment: A Final Report of the U.S. Department of Education Task Group," (coordinated and prepared by the Office of Elementary and Secondary Education, Dr. Lawrence F. Davenport, Assistant Secretary)(1986) at 2.

Section 193(a) of Title I (20 U.S.C. §2843(a)) contains an 85 percent "hold harmless" provision which operates when adjustments in allocations are necessitated by appropriations. This "hold harmless" provision, which does not require States and LEAs to spend at least 85 percent of their allocations annually, is still operative under Chapter 1. §554(b)(1)(c) of Chapter 1 (20 U.S.C. §3803(b)(1)(c).

* * *

- Describe the SEA's procedures for ensuring that funds are spent within the 27 month period of their availability.

The LEA portion of the 1986 ED monitoring guide does not address carryover funds directly. The guide, at xxxix, however, does ask federal monitors to "[d]escribe the LEA's procedure for controlling obligations and expenditures."

The 1985 OMB Compliance Supplement, at 6, describes the "compliance requirement" and "suggested audit procedures" as follows:

> Compliance Requirement
>
> An SEA or LEA may obligate Chapter 1 funds only during the fiscal year for which the funds were appropriated and during the succeeding fiscal year, i.e., commit funds from a specifically identified fiscal year, according to state law or practice, to the support of specific programmatic or administrative activities. (P.L. 97-35, Sec. 596(b); Sec. 412(b) of GEPA)(34 CFR 200.64)
>
> Suggested Audit Procedures
>
> - Test expenditure and related records and note dates for obligation of grant funds.
> - Test older unliquidated obligations for currency.

The legal framework for carryover funds appears to be internally consistent.

CONCLUSION

In the Education Consolidation and Improvement Act of 1981, Congress sought to accomplish the goals of federal compensatory education with a legal framework of diminished length, prescriptiveness, and complexity.[117] ED regulations reflect this new approach, and accompanying ED comments often reject requests for specific standards implementing the statute. Nonregulatory guidance, which may or may not be binding on LEAS, is an important aspect of this approach to deregulation. In this context, some ED letters rely on "inapplicable" EDGAR regulations to provide guidance and refer to Title I regulations no longer in effect to answer questions from the field. Excerpts from Title I regulations are also used to provide examples in the NRG.

The 1983 Technical Amendments restored some Title I statutory provisions originally dropped in 1981. In some areas -- parent involvement and participation of private school students, for example -- regulatory and nonregulatory guidance has increased. For most of the topics reviewed, however, the regulations often merely paraphrase the statute.

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[117] In contrast, Congress, in the Education Amendments of 1978, placed in the Title I statute several concepts previously developed in regulations or policy documents, directed the promulgation of additional regulations on topics inadequately addressed in the past, and also requested a policy manual which would collect all relevant legal standards and illustrate their application through examples. Although the goal was to provide uniform, comprehensive, clear, specific, and conveniently available legal guidance to all officials responsible for implementation of federally funded compensatory education, this approach increased the length, complexity, and prescriptiveness of the Title I legal framework.

Our description of the legal framework is not exhaustive. We know, for example, that interpretations of the legal framework are included in ED program review letters and audit reports which we did not consider because a topical analysis of these documents is the subject of a companion study.

In addition, our analysis has not addressed the adequacy, clarity, or comprehensiveness of the legal framework. We have focused only on the internal consistency of selected provisions. We have not discussed whether particular Chapter 1 provisions are sufficient to achieve Congressional intent. Nor have we dwelled on ambiguities. We note, however, that the legal framework, as it now stands, is uneven in specificity; some topics are elaborated far more than others.

In general, we have found that the vast majority of provisions in the evolving legal framework are mutually consistent, particularly after technical amendments, resolution of the GEPA dispute, three sets of Chapter 1 regulations (November 1982, April 1985, and May 1986), and two editions of nonregulatory guidance. There are some areas, however, where questions of consistency arise. We summarize these below.

Federal Management and Oversight

The legal framework for federal management and oversight is generally internally consistent. In the area of federal rule-making, however, there are two issues which are of interest. The first concerns §431 of GEPA which defines the term "regulation" as including "any . . . guidelines, interpretations, orders, or requirments of general applicability prescribed by" the Secretary (emphasis added) and which requires publication of a proposed "regulation" in the Federal Register for comment before it takes effect. Since the NRG appears to be a set of "guidelines", or at least a collection of "interpretations", this raises the question of whether the NRG constitutes "guidelines" or "interpretations" within the statutory definition of "regulation". If so, could it be asserted that the NRG has no effect because it was not published in the Federal Register in accordance with §431 of GEPA? How does ED's position that the NRG is not binding on SEAs or LEAs (unless adopted by an SEA) bear on this issue?

The second issue of interest involves §431(c) of GEPA which mandates that "[a]ll such [ED] regulations shall be uniformly applied and enforced throughout the fifty States." There may be a potential inconsistency between Congressional intent concerning uniform application and enforcement of ED regulations and ED's frequent refusal to develop standards for inclusion in the Chapter 1 regulations. Similarly, there may be a potential inconsistency between the mandate that ED regulations be uniformly applied and enforced and ED's position on the "inapplicability" of EDGAR (unless adopted by an SEA).

In the area of federal enforcement, there is a minor inconsistency in the judicial review provisions for withholding of payments and for cease and desist orders. The judicial review provision for withholding of payments (§593(b) of ECIA) includes a presumption of compliance which can be overcome by findings of fact by the Secretary. The judicial review provision for cease and desist orders (§455 of GEPA) does not contain such a presumption of compliance.

Other areas of the legal framework for federal management and oversight appear to be mutually consistent. We note, however, that the 1985 OMB Compliance Supplement for State and local auditors does not reflect the 1983 Technical Amendments. Delays in updating such documents are not uncommon.

State Management and Oversight

The legal framework for state management and oversight is largely consistent. In the area of State rulemaking, however, we did not review State Chapter 1 rules, regulations or policies. Consequently, we cannot comment on the extent to which the State legal framework is consistent with the federal legal framework.

One possibly inconsistent aspect of the program's legal framework is the the interaction between the "inapplicability" of EDGAR and the statutory requirement that States identify State-imposed requirements. ED, on the one hand, renders most of EDGAR inapplicable to Chapter 1 (unless an SEA adopts EDGAR). On the other hand, ED says, if an SEA adopts EDGAR, which is a federal regulation, then the SEA must identify it as a State-imposed requirement. EDGAR, of course, provides answers to many questions that program implementers confront.

There is also a slight inconsistency in the legal framework for application approval. The section of the Chapter 1 regulations containing standards for application approval says an SEA "shall approve" an LEA's application if it "meets the requirements in §556 of Chapter 1." §200.14(a), 47 FR 52345 (November 19, 1982). Section 556 does not mention certain GEPA assurances which the LEA must give to the SEA. As a practical matter, however, this is not a significant inconsistency since the 1986 NRG indicates that keeping these assurances on file at the SEA will suffice.

In the area of State monitoring, the 1985 ED Program Review Guide contains federal expectations that are not articulated in the statute, regulations, or NRG. The portion of the 1985 Program Review Guide concerning State monitoring describes as "possible problems" such matters as "few reports to LEAs of SEA's monitoring visits" and "no evidence that SEA requires corrective action." Similarly, the 1986 ED monitoring guide refers to monitoring schedules and monitoring instruments. SEAs may understand that these are federal expectations, but such expectations are not reflected in any standards for SEA monitoring in the statute, regulations or NRG.

With respect to the State enforcement, there would easily be the appearance of an inconsistency between ED indicating, in a 1982 regulatory comment, that Chapter 1 does not specifically authorize compliance agreements in lieu of withholding and ED advising a State, in a 1986 letter, that the SEA's policy for a compliance agreement ("repayment agreement") was "allowable".

The Chapter 1 regulations assert the SEA obligation to "conduct an evaluation" of LEA Chapter 1 programs can be met by mere collection of test score data. Title I Congressional reports and GEPA afford a basis to believe, however, that when Congress says "conduct an evaluation," Congress means perform a qualitative assessment of funds allocation, administrative, and educational practices, as well as gather test scores. If ED offered either a reason why such qualitative assessments are not necessary for SEAs to conduct, or evidence that Congress in this particular statute contemplated a concept of evaluation different from that reflected in Title I and GEPA, ED's regulatory position could be assessed. The regulation, as it stands, may be inconsistent with the statute.

Local Implementation

The legal framework for local implementation is also generally consistent. We have, however, identified some areas where questions of consistency arise.

Congress enacted in Chapter 1 a statutory exemption from the supplement, not supplant requirement for State and local compensatory education funds meeting certain criteria. The NRG, however, says that Chapter 1 services must supplement State or local services "required by law," making no exception for State compensatory services which meet exclusion standards but which, under a State statute, are mandatory. If the NRG in fact means that State compensatory education services required by State law are not eligible for the supplement, not supplant exclusion, the NRG may be inconsistent with Congress's intent in enacting this exclusion.

Both the 1983 and the 1986 NRG interpret the comparability exemption for "unpredictable changes in student enrollment or personnel assignments" as if the provision exempted all changes that were, for whatever reason, "unpredicted." This interpretation rewards those who decline or neglect to seek facts from which advance predictions reasonably might be made. Where student mobility is a recurring phenomenon, mid-year enrollment change is not unpredictable. Though the magnitude or direction of change may be uncertain, appropriate efforts at contingency planning, designed to lessen the impact of change on service equivalence, might reasonably be required. In implementing the mandate for equitable services to private school students, ED has determined that mid-year changes must be made if necessary to ensure equity. It would appear inconsistent not to require the same approach in attempting to ensure equivalence of services for comparability purposes.

There is also a consistency question about the intended meaning of "unpredictable changes in . . . personnel assignments." Personnel assignments are conscious, deliberate acts and the circumstances in which Congress assumes such decisions appropriately might be deemed "unpredictable" are not immediately apparent. Presumably, Congress does not intend carte blanche exemption for lack of administrative planning. Without explanation or limitations indicating the provision is not meant to be the refuge of an administrator whose actions are "unpredictable," the provision appears to be inconsistent with the more fundamental purpose of the comparability requirement -- ensuring service equivalence to the extent competent administration reasonably can accomplish this objective.

The comments accompanying the May 19, 1986 regulations identify the underlying objective of parent involvement as assisting individual parents to help their children's achievement. Consistent with this objective, the regulations suggest parent training in home education of their children; they do not suggest other training. ED's May 27, 1986 Memorandum to State Chapter 1 Coordinators, however, states that training parents to educate their children at home is of secondary importance. ED's memorandum says that among the first priorities should be training in the statute, regulations, guidelines, project application project budget, and past evaluation data. The May 19 comments and the May 27 memorandum seem inconsistent. The memorandum, moreover, may reflect Congressional intent better than ED's regulatory comments. Congressional reports appear to contemplate a role for parents as an organized, effective, policy-influencing and compliance-monitoring force in the Chapter 1 community.

Thus, with the above-mentioned exceptions, the areas of the Chapter 1 legal framework we examined are largely internally consistent.